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2602 No. 12373

United States
Court of Appeals
For the Ninth Circuit.

JOHN STOPPELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

NOV 25 1948

No. 12373

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For the Ninth Circuit.

JOHN STOPPELLI,

Appellant,

vs.

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for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

J. W. EHRLICH,

Attorney for Defendant and Appellant,

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San Francisco, California.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Attorney for Plaintiff and Appellee.

Post Office Building,

San Francisco, California.

United States District Court, Northern District of
California, Southern Division
31953

THE UNITED STATES OF AMERICA,

vs.

RAYMOND A. LEEPER, JAMES MARVIN
BALLARD, ANDREW INGOGLIA, PAT-
RICK JOHN McDONOUGH, and JOHN
STOPPELLI.

INDICTMENT

(Violations of Title 26 USCA, §2553 & 2557-
Harrison Narcotic Act; 21 USC §174-Jones-
Miller Act; 18 USC §371-Conspiracy.)

First Count: (26 USC §2553 and §2557, (Harrison
Narcotic Act));

The Grand Jury Charges: That Raymond A.
Leeper, James Marvin Ballard, Andrew Ingoglia,
Patrick John McDonough, and John Stoppelli,
(whose full and true names are, and the full and
true name of each of whom is, other than herein-
above stated, to said Grand Jury unknown, herein-
after called "said defendants"), on or about the
31st day of October, 1948, in the City of Oakland,
County of Alameda, State of California, within said
Division and District, unlawfully did sell, dispense
and distribute, not in or from the original stamped
package, a certain quantity of a derivative and

preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes, containing approximately 10 ounces and 436 grains of heroin.

Second Count: (Jones-Miller Act, 21 USC §174);

The Grand Jury further charges: That the said defendants, Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at the time and place mentioned in the first count of this indictment, within said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes containing approximately 10 ounces and 436 grains of heroin, and the said heroin had been imported into the United States of America, contrary to law as said defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli then and there knew.

Third Count: (Conspiracy, 18 USC §371);

The Grand Jury further charges: That the said defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at a time and place to said Grand Jury unknown, did conspire together and with other persons whose names are to said Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of mor-

phine, to-wit, heroin, in violations of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendants then and there well knew, in violation of Section 174 of Title 21 United States Code; that thereafter and during the existence of said conspiracy one or more of said defendants, hereinafter mentioned by name, in the City of Oakland, County of Alameda, State of California, within said Division and District, did the following acts in furtherance thereof and to effect the objects of the conspiracy aforesaid:

1. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant Raymond A. Leeper had a conversation with George H. White, District Supervisor of the Bureau of Narcotics of the United States Treasury Department, in Room 306 of the Clay Ten Hotel, 1014 Clay Street.

2. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant James Marvin Ballard left the Clay Ten Hotel, 1014 Clay Street, entered a 1941 Cadillac automobile, California license Number 17 K 120, parked in the vicinity of the said Clay Ten Hotel, 1014 Clay Street, and drove the said automobile away from the said vicinity of the said Clay Ten Hotel.

3. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within

said Division and District, the said defendant James Marvin Ballard drove the said 1941 Cadillac automobile, California License Number 17 K 120, to the vicinity of the Clay Ten Hotel, 1014 Clay Street, with the defendants Andrew Ingoglia and Patrick John McDonough as passengers in said automobile.

4. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendants James Marvin Ballard, and Andrew Ingoglia left the said 1941 Cadillac automobile, California License Number 17 K 120, and entered the said Clay Ten Hotel, 1014 Clay Street.

5. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, immediately after the defendants James Marvin Ballard and Andrew Ingoglia left the said Cadillac 1941 automobile, California License Number 17 K 120, and entered the said Clay-Ten Hotel, 1014 Clay Street, the defendant Patrick John McDonough sat in the driver's seat of the said automobile.

6. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the said defendants James Marvin Ballard and Andrew Ingoglia stood in front of the closed door of room 306 of the Clay-Ten Hotel, 1014 Clay Street.

7. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant Raymond

A. Leeper opened the door from the inside of Room 306, at the Clay-Ten Hotel, 1014 Clay Street, and received a package from the defendants James Marvin Ballard and Andrew Ingoglia, who were then and there standing outside of said door.

8. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, immediately after the defendants Raymond A. Leeper received the package from the said defendants James Marvin Ballard and Andrew Ingoglia, the said defendant Raymond A. Leeper shut the door of Room 306 and remained inside of the said Room 306 of the Clay-Ten Hotel, 1014 Clay Street, and the said defendants James Marvin Ballard and Andrew Ingoglia remained in front of the door outside of the said Room 306 for a short period of time.

A True Bill.

/s/ JOS. L. SCOTT,

Foreman.

FRANK J. HENNESSY,

U. S. Attorney.

By /s/ R. B. McMILLAN,

Asst. U. S. Attorney.

Approved as to Form:

/s/ R. B. McMILLAN.

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 24th day of February, in the

year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable George B. Harris,
District Judge.

No. 31953

UNITED STATES OF AMERICA,

vs.

JOHN STOPPELLI.

ARRAIGNMENT AND PLEA

This case came on for arraignment. Joseph Karesh, Esq., Asst. U. S. Atty., for U. S. Defendant was present with his attorney, Jake Ehrlich, Esq. Defendant was arraigned upon the Indictment, stated his true name to be as contained therein, the substance of the charge being stated to defendant and copy of Indictment handed to him. Defendant stated he understood the charge against him. Mr. Ehrlich waived reading of Indictment.

Defendant pleaded "Not Guilty" as to Counts 1, 2 and 3 of Indictment. On motion of Mr. Karesh and with consent of Mr. Ehrlich, ordered case continued to March 1, 1949 to be set for trial on calendar of Hon. Dal M. Lemmon, District Judge.

At A Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of June, in the year of

our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dal M. Lemmon,
District Judge.

No. 31953

UNITED STATES OF AMERICA,

vs.

RAYMOND A. LEEPER, JAMES MARVIN
BALLARD, ANDREW INGOGLIA, PAT-
RICK JOHN McDONOUGH and JOHN
STOPPELLI.

ORDER DENYING MOTIONS FOR MISTRIAL
AND FOR JUDGMENT OF ACQUITTAL

The parties hereto and the jury impaneled herein being present as heretofore, the further trial of this case was this day resumed. W. Harold Greene was sworn and testified for the United States. Mr. Karesh introduced in evidence and filed U. S. Exhibits Nos. 1 to 12 inclusive; 17 to 36 inclusive. The United States then rested its case. Mr. Ehrlich, Mr. Deasy, Mr. Kernes and Mr. Dunning, on behalf of their respective clients, made motions for a mistrial, which said motions were ordered denied. Mr. Ehrlich, Mr. Deasy, Mr. Kernes and Mr. Dunning, on behalf of their respective clients, made motions for judgment of acquittal, which said motions were ordered denied. James Marvin Ballard and Patrick John McDonough were sworn and testified in their own behalf. Defendants James Marvin Bal-

lard and Patrick John McDonough rested. The defendants Raymond A. Leeper, Andrew Ingoglia and John Stoppelli rested. The evidence was there-upon closed. After hearing Mr. Karesh, Mr. Ehrlich, Mr. Deasy, Mr. Kernes and Mr. Dunning, it is Ordered that this case be continued to June 10, 1949 at 10 a.m., and the jury, after being duly admonished, was excused until that time.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to the defendants at the bar, as follows:

Raymond A. Leeper guilty on the First Count, guilty on the Second Count, guilty on the Third Count.

James Marvin Ballard guilty on the First Count, guilty on the Second Count, guilty on the Third Count.

Andrew Ingoglia guilty on the First Count, guilty on the Second Count, guilty on the Third Count.

Patrick John McDonough guilty on the First Count, guilty on the Second Count, guilty on the Third Count.

John Stoppelli guilty on the First Count, guilty on the Second Count, guilty on the Third Count.

/s/ G. CHILDRESS,
Foreman.

[Endorsed]: Filed June 13, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant, John Stoppelli, moves the court to grant him a new trial for the following reasons:

1. The court erred in denying the defendant's motion for acquittal made at the conclusion of the case of the government.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The court erred in admitting testimony of the witness W. Harold Greene to which objections were made.

5. The court erred in charging the jury and in refusing to charge the jury as requested.

6. The court erred in denying the defendant's motion for a mistrial.

7. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: The only witness against the defendant, John Stoppelli, was W. Harold Greene, a fingerprint expert, who, under questioning by the government and not responsive to any question, made the following statement referring to John Stoppelli's fingerprints:

"We have a national book, every district supervisor in the country, in the Narcotic Bureau, has a

national book published by the Narcotic Bureau,
all of the major known——”

Dated June 16, 1949.

/s/ J. W. EHRLICH,

Attorney for Defendant,

John Stoppelli.

[Endorsed]: Filed June 17, 1949.

[Title of District Court and Cause]

NOTICE OF MOTION FOR NEW TRIAL

To Frank W. Hennessy, United States Attorney:

Please take notice that on Thursday, June 23, 1949, John Stoppelli, one of the defendants in the above entitled action, will move the above entitled court in the courtroom of the Honorable Dal M. Lemmon, for its order vacating and setting aside the verdict of the jury heretofore rendered against said John Stoppelli and granting said John Stoppelli a new trial herein.

Dated this 17th day of June, 1949.

/s/ J. W. EHRLICH,

Attorney for Defendant,

John Stoppelli.

[Endorsed]: Filed June 17, 1949.

AFFIDAVIT OF JAMES MARVIN BALLARD

State of California,

City and County of San Francisco—ss:

James Marvin Ballard, being duly sworn on oath
deposes and says:

That he is the James Marvin Ballard who appears as one of the defendants in the above entitled action; that after he and the other defendants were sentenced to various terms of imprisonment, and while they were together in the San Francisco County Jail, he had a discussion with the defendant Andrew Ingoglia in the presence of the defendants John Stoppelli, Raymond A. Leeper and Patrick John McDonough concerning the defendant John Stoppelli.

That the defendant Ingoglia said to all those present, to wit, John Stoppelli, Raymond A. Leeper, Patrick John McDonough and James Marvin Ballard, that John Stoppelli had nothing whatever to do with the offenses alleged in the above captioned indictment.

That Ingoglia received the narcotics in bulk from a source which he did not disclose but said it was not Stoppelli.

That Ingoglia never before the trial had seen or known or done any business with said Stoppelli, and that Ingoglia first met Stoppelli at the first calling of this case.

That each of the other defendants present, each for himself said that they had never known, seen, done business with or talked to Stoppelli until they talked to him on the first calling of this case. That your affiant never saw, did business with or knew said Stoppelli until he saw him for the first time during the trial of the above matter.

That the said Ingoglia further said that he received the narcotics in bulk in one package, and

after receipt he cut them with milk-sugar in a residence in San Francisco.

That he Ingoglia purchased the celophane envelopes, and the plain white envelopes, in which the narcotics were packaged, in a store on Market Street in San Francisco.

That Ingoglia received the narcotics more than thirty days prior to the time they were delivered to Leeper.

That Ingoglia knows that the fingerprint on the white envelope was not made by Stoppelli because Stoppelli was not in San Francisco and did not and could not handle the said envelopes; that the narcotics were not purchased from Stoppelli, that Ingoglia has never done any business with Stoppelli and that Stoppelli had nothing to do with the cutting and repackaging of said narcotics.

That each of the other defendants urged Ingoglia to make a statement of the true facts but he, Ingoglia, refused to do so.

That Ingoglia said he did not take the stand to testify because he feared he would incriminate his associates who brought the narcotics to him and who aided him in cutting and repackaging such narcotics.

/s/ JAMES MARVIN BALLARD.

Subscribed and sworn to before me this 30th day of July, 1949.

[Seal] /s/ L. H. CONDON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 8, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF PATRICK JOHN
McDONOUGH

State of California,

City and County of San Francisco—ss:

Patrick John McDonough, being first duly sworn on oath deposes and says:

That he is the Patrick John McDonough who appears as one of the defendants in the above entitled action; that after he and the other defendants were sentenced to various terms of imprisonment, and while they were together in the San Francisco County Jail, he had a discussion with the defendant Andrew Ingoglia in the presence of the defendants John Stoppelli, Raymond A. Leeper and James Marvin Ballard concerning the defendant John Stoppelli.

That the defendant Ingoglia said to all those present, to wit, John Stoppelli, Raymond A. Leeper, Patrick John McDonough and James Marvin Ballard, that John Stoppelli had nothing whatever to do with the offenses alleged in the above captioned indictment.

That Ingoglia received the narcotics in bulk from a source which he did not disclose but said it was not Stoppelli.

That Ingoglia never before the trial had seen or known or done any business with said Stoppelli, and that Ingoglia first met Stoppelli at the first calling of this case.

That each of the other defendants present, each for himself said that they had never known, seen, done business with or talked to Stoppelli until they talked to him on the first calling of this case. That your affiant never saw, did business with or knew said Stoppelli until he saw him for the first time during the trial of the above matter.

That the said Ingoglia further said that he received the narcotics in bulk in one package, and after receipt he cut them with milk-sugar in a residence in San Francisco.

That he, Ingoglia, purchased the celophane envelopes, and the plain white envelopes, in which the narcotics were packaged, in a store on Market Street in San Francisco.

That Ingoglia received the narcotics more than thirty days prior to the time they were delivered to Leeper.

That Ingoglia knows that the fingerprint on the white envelope was not made by Stoppelli because Stoppelli was not in San Francisco and did not and could not handle the said envelopes; that the narcotics were not purchased from Stoppelli, that Ingoglia has never done any business with Stoppelli and that Stoppelli had nothing to do with the cutting and repackaging of said narcotics.

That each of the other defendants urged Ingoglia to make a statement of the true facts but he, Ingoglia, refused to do so.

That Ingoglia said he did not take the stand to testify because he feared he would incriminate his

associates who brought the narcotics to him and who aided him in cutting and repackaging such narcotics.

/s/ PATRICK JOHN
McDONOUGH.

Subscribed and sworn to before me this 30th day of July, 1949.

[Seal] /s/ L. H. CONDON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 8, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF J. W. EHRLICH
State of California,
City and County of San Francisco—ss:

J. W. Ehrlich, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted and licensed to practice his profession in all of the courts of the State of California and in the United States District Court in and for the Northern District of California and that he is the attorney for John Stoppelli, one of the defendants above named.

That after the trial of the above entitled action and after the above named defendants had been sentenced to various terms of imprisonment, while they were together in the San Francisco County Jail, your affiant had a conversation with one An-

drew Ingoglia, one of the defendants above named.

At that time Andrew Ingoglia stated to your affiant that the defendant John Stoppelli had nothing to do with this case, and that said John Stoppelli was unknown to him and to the other defendants; that neither he nor the other defendants ever saw, talked to or did business with the said John Stoppelli; that the fingerprint in question on said envelope could not have been made by John Stoppelli because he, Ingoglia, received the narcotics in bulk in one package and after receipt cut them with milk-sugar in San Francisco; that he, Ingoglia, purchased the celophane envelopes and the plain white envelopes in which the narcotics were packaged in a store on Market Street in San Francisco.

That your affiant urged the said Ingoglia to testify to the facts herein contained, but that he refused to do so on the ground that it would incriminate his associates who delivered the narcotics to him and aided him in cutting and repackaging such narcotics.

/s/ J. W. EHRLICH.

Subscribed and sworn to before me this 30th day of July, 1949.

[Seal] L. H. CONDON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 8, 1949.

At a Stated Term of the District Court of the
United States for the Northern District of Cali-

fornia, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 8th day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dal M. Lemmon,
District Judge.

No. 31953

UNITED STATES OF AMERICA

vs.

JOHN STOPPELLI

ORDER GRANTING NEW TRIAL AS TO
COUNT 3 OF INDICTMENT, AND DENY-
ING NEW TRIAL AS TO COUNTS 1 AND
2 OF INDICTMENT; SENTENCE

This case came on for judgment and for hearing of motion for new trial. Joseph Karesh, Esq., Asst. U. S. Atty., for U. S. Defendant was present in custody of U. S. Marshal and with his attorney, J. W. Ehrlich, Esq. Mr. Ehrlich presented and filed three affidavits. Ordered motion for new trial granted as to Count 3 of Indictment, and denied as to Counts 1 and 2 of Indictment. After hearing counsel, Ordered defendant sentenced to imprisonment in a Federal Penitentiary for Five (5) Years on Count 1 of Indictment, and Six (6) Years and fined One Hundred Dollars (\$100.00) on Count 2 of Indictment, said terms of imprisonment to run Concurrently.

Ordered that judgment be entered herein accordingly. Ordered that defendant be granted a stay of execution of judgment for period of one (1) week. Mr. Ehrlich made a motion for release of defendant on bond pending appeal, which motion was ordered submitted. G. Albert Wahl, Probation Officer, was present.

District Court of the United States for the Northern
District of California, Southern Division
No. 31953-L

UNITED STATES OF AMERICA

vs.

JOHN STOPPELLI

JUDGMENT AND COMMITMENT

On this 8th day of August, 1949 came the attorney for the government and defendant appeared in person and with counsel;

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Title 26 USC, Sec. 2553 and 2557, (Harrison Narcotic Act), Ct. 1, and (Jones-Miller Act, 21 USC, Sec. 174) Ct. 2, as charged in Counts One and Two of Indictment and the court having asked the defendant whether he

has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years on Count One and Six (6) Years on Count Two of the Indictment and pay a fine to the United States of America in the sum of One Hundred Dollars (\$100.00) on Count Two of the Indictment.

It Is Further Ordered that said terms of imprisonment run Concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAL M. LEMMON,

United States District Judge.

/s/ C. C. EMERSON,

Deputy Clerk.

Filed and entered this 8th day of August, 1949.

C. W. CALBREATH,
Clerk.

In the United States District Court for the Northern
District of California, Southern Division
No. 31953-R

UNITED STATES OF AMERICA

Plaintiff,

vs.

RAYMOND A. LEEPER, JAMES MARVIN
BALLARD, ANDREW INGOGLIA, PAT-
RICK JOHN McDONOUGH and JOHN
STOPPELLI,

Defendants.

NOTICE OF APPEAL

Name and address of appellant—John Stoppelli,
c/o J. W. Ehrlich, 512 DeYoung Bldg., San Fran-
cisco, California.

Name and address of appellant's attorney—J.
W. Ehrlich, 512 DeYoung Bldg., San Francisco,
California.

Offense—First Count: Violation of Title 26 U.
S. Code Annotated, Sections 2553 and 2557 in that
the defendant did unlawfully sell, dispense and
distribute a quantity of heroin. Second Count:
Violation of Title 21 U. S. Code Annotated, Section
24 by concealing and facilitating the concealment
of heroin. Third Count: Violation Title 18 U. S.
Code Annotated, Section 371, charging conspiracy
to sell, distribute and conceal heroin.

Judgments, Orders and Sentence—Denial of Mo-
tion for Mistrial and motion for verdict of acquittal

on June 9th, 1949, verdict of Guilty on June 13, 1949, denial of motion for new trial on Counts 1 and 2 August 8th, 1949, and sentence on Count 1 for five years and sentence on Count 2 of 6 years and \$100.00 fine on Count 2. Motion for new trial granted as to Count 3.

Appellant is presently confined in the County Jail of the City and County of San Francisco, State of California.

I, John Stoppelli, the above named appellant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgments and orders.

Dated this 12th day of August, 1949.

/s/ J. W. EHRLICH,

Attorney for Appellant.

[Endorsed]: Filed Aug. 12, 1949.

In the United States District Court for the Northern
District of California, Southern Division
No. 31953-R

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

vs.

JOHN STOPPELLI,
Defendant and Appellant.

AMENDED NOTICE OF APPEAL

Name and address of appellant—John Stoppelli, c/o J. W. Ehrlich, 512 DeYoung Bldg., San Francisco, California.

Name and address of appellant's attorney—J. W. Ehrlich, 512 DeYoung Bldg., San Francisco, California.

Offense—First Count: Violation of Title 26 U. S. Code Annotated, Sections 2553 and 2557 in that the defendant did unlawfully sell, dispense and distribute a quantity of heroin. Second Count: Violation of Title 21 U. S. Code Annotated, Section 174 by concealing and facilitating the concealment of heroin. Third Count: Violation Title 18 U. S. Code Annotated, Section 371, charging conspiracy to sell, distribute and conceal heroin.

Judgments, Orders and Sentence—Denial of motion for mistrial and motion for verdict of acquittal on June 9th, 1949, verdict of guilty on June 13, 1949, and sentence on Count 1 of five years and sentence on Count 2 of 6 years and \$100.00 fine on Count 2. Motion for new trial granted as to Count 3.

Appellant is presently confined in the County Jail of the City and County of San Francisco, State of California.

I, John Stoppelli, the above named appellant, hereby appeals to the United States Circuit Court

of Appeals for the Ninth Circuit from the above stated judgments and orders.

Dated this 15th day of August, 1949.

/s/ J. W. EHRLICH,
Attorney for Appellant.

[Endorsed]: Filed Aug. 15, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR RECORD ON APPEAL

Comes now the defendant and appellant, John Stoppelli, and having filed herein his appeal does hereby designate the following portions of the records, proceedings and evidence to be contained in the record on appeal and requests the Clerk of this Court to so incorporate as follows:

1. Indictment.
2. Minute Order of arraignment of Defendant, John Stoppelli.
3. Plea of not guilty by John Stoppelli.
4. Order of Court denying motions for mistrial and for judgment of acquittal by defendant, John Stoppelli.
5. Verdict of the jury.
6. Reporter's transcript of all oral proceedings taken down by the official court reporter in the above entitled case at all stages of the proceedings in this case from the beginning of the trial thereof on the 7th day of June, 1949 to and including the

denial of motion for a new trial on August 8, 1949.

7. Motion for new trial and notice thereof filed by defendant John Stoppelli.

8. Affidavit of James Marvin Ballard filed in support of motion for new trial.

9. Affidavit of Patrick John McDonough filed in support of motion for new trial.

10. Affidavit of J. W. Ehrlich filed in support of motion for new trial.

11. Order granting new trial as to Count 3 of indictment and denying new trial as to Counts 1 and 2 of indictment.

12. Judgment of the Court as to Defendant John Stoppelli.

13. Notice of Appeal.

14. Amended Notice of Appeal.

15. Praecipe for Record on Appeal.

Dated this 15th day of August, 1949.

/s/ J. W. EHRLICH,

Attorney for Defendant and
Appellant, John Stoppelli.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 16, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Indictment.

Minute Order of February 24, 1949—Arraignment and Plea.

Minute Order of June 9, 1949—Order Denying Motion for Mistrial and Motion for Judgment on Acquittal.

Verdict.

Motion for New Trial.

Affidavit of James Marvin Ballard.

Affidavit of Patrick John McDonough.

Affidavit of J. W. Ehrlich.

Minute Order of August 8, 1949—Order Granting New Trial as to Count 3 of the Indictment, and Denying New Trial as to Counts 1 and 2 of the Indictment; Sentence.

Judgment and Commitment.

Notice of Appeal.

Amended Notice of Appeal.

Praecipe for Record on Appeal.

Reporter's Transcripts—Vol. 1, for June 7, 1949;

Vol. 2, for June 8, 1949; Vol. 3, for June 9, 1949;
Vol. 4, for June 13, 1949—Charge of the Court.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
19th day of September, A.D. 1949.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court
of the United States for the Northern District of
California, do hereby certify that the accompanying
document, listed below, is the original Reporter's
Transcript filed in this Court, and that it constitutes
the Supplement to Record on Appeal herein, to wit:

Reporter's Transcript—Vol. 5—for June 13, July
5, and August 8, 1949.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court, this
12th day of October, 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

Filed Oct. 11, 1949.

PAUL P. O'BRIEN,
Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. Dal M. Lemmon,
Judge.

No. 31953-L

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAYMOND A. LEEPER, JAMES MARVIN
BALLARD, ANDREW INGOGLIA, PAT-
RICK JOHN McDONOUGH, and JOHN
STOPPELLI,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, June 7, 1949

Appearances

For the Government:

JOSEPH KARESH, ESQ.,
Assistant United States Attorney.

For the defendants Leeper and Ballard:

JOSEPH DEASY, ESQ.

For the defendant Ingoglia:

EDMUND DUNNING, ESQ.

For the defendant McDonough:

ROBERT S. KERNES, ESQ.

For the defendant John Stoppelli:

J. W. EHRLICH, ESQ. [1*]

(A jury was duly impaneled and sworn to try the cause.)

Opening Statement On Behalf Of The Government

Mr. Karesh: Ladies and gentlemen of the jury: As his Honor has indicated, this is an indictment in three counts. The first count charges a violation of the Harrison Narcotic Act.

The date of the offense, on or about October 31, 1948, the illegal sale of a quantity of heroin, which is a proscribed drug, a narcotic.

The second count charges a violation of the Jones-Miller Act, which is the illegal possession or the illegal concealment or the facilitation of the concealment of a quantity of heroin, narcotics, approximately ten ounces and 435 grains.

The third count charges a conspiracy to violate either one or both of these Acts. In other words, as his Honor has indicated, it is a violation of law—the conspiracy statute is violated if two or more men agree in a conspiracy to violate the law. In other words, here we have the Harrison Act. One man himself may violate that Act by selling illegal narcotics. If two or more men agree to sell narcotics, both of them have violated not only the Harrison Act, but they commit a conspiracy.

The same way with the Jones-Miller Act. If one man has [2] in his possession and cannot explain away the possession of a quantity of narcotics, that

* Page numbering appearing at top of page of original Reporter's Transcript.

is a violation of the Jones-Miller Act; but if two or more agree to possess or facilitate the concealment or conceal or aid and abet in the possession or concealment of that narcotic, not only are they guilty of a violation of the Jones-Miller Act, but they are likewise guilty of conspiracy to violate this act.

The offenses charged took place in Oakland and in other places. Now, members of the jury, I ask you to bear in mind throughout the course of the presentation of the Government's case that if a man puts in action a criminal force, let's say in New York, in the State of New York, and ultimately the crime is consummated in the State of California, even though the man is in New York, because he set the criminal force loose and the force was consummated or the act was consummated in California, he is guilty of a violation of the law in California.

I will also ask you to bear in mind——

Mr. Deasy: Excuse me, please. I submit to the Court this is not a statement by the United States Attorney of what he expects to prove by his evidence.

The Court: Well, I think he is trying to outline the legal background of it in order that they may understand the evidence as it comes in in the light of the legal background. Proceed.

Mr. Karesh: I would also like to members of the jury to bear in mind, as I know you will, during the course of the presentation [3] of the Government's case, that anyone who aids and abets in

the commission of a crime is as guilty as the person who commits the crime. In other words, if there is a person in the State of New York who sends narcotics to the State of California, and those narcotics are possessed in California and are sold in California, that person who sends the narcotics to California is as guilty as the person who possesses the narcotics in California and who sells the narcotics in California, and is likewise guilty of a criminal conspiracy to violate the Act.

Now, we will go to the date October 31, 1948, mentioned in the indictment. I would call your attention, members of the jury, that the Government is not limited to that date, October 31, 1948. If we can show that any criminal act leading to what occurred on October 31, 1948 occurred within three years of the return of the indictment, which we call the statutory period, and that person started that act three years ago, before October 31, 1948, or, rather, before the return of the indictment he is guilty under the law. I ask you to bear that in mind as we present our case.

We will show you that in Oakland, California, at Tenth and Clay Streets, is the Clay-Ten Hotel. It is a small hotel. And in the Clay-Ten Hotel in Oakland in room 306, there lived on October 31, 1948 and there lived for a considerable period prior to that time the defendant Raymond Leeper, and Raymond Leeper had an automobile, and that automobile becomes extremely [4] significant, registered to his nephew, but of which he was the owner or the

possessor. The automobile will become extremely important in the presentation of the Government's case.

Now, on October 31, 1948, Colonel White, District Supervisor of the Bureau of Narcotics, went with an informer—and we say to you now and we say it without apology at the opening of our case, that the Government is permitted the use of the informer—no prejudice must be shown the Government's case because the Government uses or used an informer. Colonel White, on October 31, 1948, on a Sunday, went with an informer to the Clay-Ten Hotel. The informer went upstairs to room 306. Colonel White went upstairs thereafter to room 306. Outside—there were other agents—outside of the hotel, the Clay-Ten Hotel, were other agents — Agent Bertin, Agent Cass, and Agent Grady.

As Colonel White went up to room 306, but prior to reaching room 306 the defendant James M. Ballard came out of that hotel and entered the Cadillac car of Leeper, by himself, under the surveillance of the agents outside. He was away for a while, for a few minutes, and then James Marvin Ballard, a few minutes later, returned in that automobile, not by himself, we will show, but from the surveillance of the agents we will show that in the car was James Marvin Ballard and Patrick McDonough and the other defendant Andrew Ingoglia. McDonough [5] moved into the driver's seat after Ballard had gotten out of the driver's seat with Ingoglia.

Into the hotel went the defendants James Marvin Ballard and Andrew Ingoglia. In the meantime Colonel White had made arrangements to buy heroin for \$900 an ounce from Leeper. Leeper told him that he was sending out Slim, who is James Marvin Ballard, to bring back the purchaser or the seller. That seller who came back with Ballard was the defendant Andrew Ingoglia.

Bear in mind that McDonough has now moved into the driver's seat outside the hotel still under the surveillance of the Government officers.

Now, what happened in room 306? James Marvin Ballard and Andrew Ingoglia were outside room 306, and we will show you that room 306 is at the end of the long hall, not straight at the end of the long hall, but about a 45-degree angle to the right, as a dead end. In other words, it is not one of the rooms running parallel to the line or to the corridor, it veers off to the right, and this will become extremely important as the Government's case develops.

There was a knock on the door. Colonel White is in the room. The defendant Raymond Leeper sticks his hand through the door and brings in a package. Colonel White looks at the package. Not more than five seconds elapsed. He breaks the package and it appears to be narcotics with 12 envelopes, in [6] through the door, and there standing in front of the door are the defendants Andrew Ingoglia and James Marvin Ballard, who had passed the packages through the door.

We will also show, ladies and gentlemen of the jury, during the course of the trial, that the defendant John Stoppelli—and we will show it by fingerprint evidence, conclusive fingerprint evidence, that a quantity of that heroin in question in that envelope, in one of the envelopes, was handled by the defendant John Stoppelli.

On the theory of law of aiding and abetting, we will show that all of them violated the Harrison Narcotic Act, all of them violated the Jones-Miller Act, and all of them conspired to violate these acts, and we will also ask you to bear in mind during the course of the trial, that the Government does not have to show that John Stoppelli handled all of the narcotics in the envelopes. If he handled the narcotics in one envelope, if he handled one ounce of narcotics, or a half ounce, or 5 grains, it is as though he handled, possessed, concealed, aided and abetted in the concealment and the sale of all the narcotics in all of the envelopes.

And that, then, will be the Government's case. We will prove it beyond a reasonable doubt and to a moral certainty.

The Court: Do counsel for the defense or the defendants wish to reserve the right later on to make their statements to the jury? [7]

Mr. Deasy: Yes, your Honor.

Mr. Ehrlich: Yes, your Honor.

Mr. Dunning: Yes, your Honor.

Mr. Kernes: Yes, your Honor.

Mr. Deasy: On behalf of all the defendants we reserve the opening statement.

At this time, may it please the Court, may we have an order excluding all witnesses from the courtroom with the exception of the witness——

The Court: Yes, you may have such an order excluding all the witnesses except the agent in charge of the case, and the defendants, and the order is that all witnesses, those here under subpoena or otherwise, will leave the courtroom, and I will ask that counsel see that their respective witnesses leave the courtroom.

Mr. Karesh: Mrs. Seeley, you are a witness, you will have to leave. Until we call you, remain outside.

The Court: Will counsel observe those that are in the courtroom? If there are any here who are witnesses, please leave the courtroom and remain outside until called.

Mr. Karesh: Are there any witnesses here for the Government inside the courtroom that have been subpoenaed?

C. E. HUBACH

called as a witness on behalf of the Government; sworn. [8]

Q. (By the Clerk): Will you state your full name to the court and jury?

The Witness: C. E. Hubach.

Direct Examination

By Mr. Karesh:

Q. You are an employee, sir, of the United States of America?

(Testimony of C. E. Hubach.)

A. I am employed by the Internal Revenue Bureau.

Q. Of the United States of America?

A. Yes.

Q. How long have you been so employed?

A. Since 1925.

Q. And in what capacity have you been employed and are now employed by the Government?

A. As a chemist.

Q. As a chemist, do you analyze substances to determine whether they contain narcotics?

A. I do.

Q. Have you made many such analyses in your long service with the Government?

A. Yes, I have made a large number of them.

Q. Have you ever analyzed any substance to determine that it contained heroin? A. Yes.

Q. Is heroin a narcotic? A. It is.

Q. Have you testified in court on more than one occasion? [9] A. Yes, I have.

Q. In narcotic cases? A. Yes.

Q. Have testified in court and identified certain substances, containing heroin? A. Yes.

Q. And what, sir, is your educational background?

A. Oh, I have a degree of Bachelor of Chemistry from Cornell University.

Q. Now, you have brought here a package.

A. Yes.

Q. Do you have it with you?

(Testimony of C. E. Hubach.)

(The witness exhibits package to counsel.)

Q. How long have you had the package with you?

A. I brought this from the laboratory this morning.

Q. How long have you had the package?

A. It was first given to me November 1, 1948.

Q. And by whom was the package and the contents of the package given you?

A. By Agent Cass, of the narcotic office.

Q. Agent Cass, of the Bureau of Narcotics of the San Francisco office?

A. Yes.

Q. Now, do you remember the way in which the narcotics were given to you? Were they in envelopes? Describe the physical [10] condition of the narcotics or the package given you by Mr. Cass?

A. They were handed to me in a brown sealed envelope, which I have here, and this envelope contained 12 small glassine or transparent paper envelopes which contained a white powder.

Q. Did you analyze the contents of each of the envelopes, small envelopes?

A. I did.

Q. And what did you find as a result of your analysis?

A. I found that each envelope contained heroin hydrochloride.

Q. Heroin hydrochloride is another name for the more commonly used term heroin?

A. Yes.

Q. You have already testified that it is a narcotic and a proscribed drug, is that right?

A. Yes.

(Testimony of C. E. Hubach.)

Q. Now, will you tell us the manner in which you made your test?

A. I made a qualitative test to determine it was heroin hydrochloride. Then I made quantitative tests to determine the amount of the heroin present.

Q. What percentage of heroin was in the package? A. The percentage is 80, 80 per cent.

Q. Of heroin? A. Heroin hydrochloride.

Q. Now, what was the balance?

A. The balance is a sugar of some sort, a reducing sugar. [11]

Q. Is milk sugar a reducing sugar?

A. Yes, it is.

Q. And milk sugar is used to cut heroin? That is correct, isn't it?

A. I have seen it used so before.

Mr. Deasy: I am sorry, I didn't get the last part of that answer.

(Answer read.)

Q. (By Mr. Karesh): Now, after you made your analysis what did you do with the heroin?

A. I placed it in another envelope and sealed it and put the envelope in the safe in the laboratory.

Q. And you have had it with you under your seal and in your possession since given you by Agent Cass on November 1, 1948, is that correct?

A. Yes, it has been in the safe and laboratory.

Q. Now, will you break the seal?

(The witness breaks the seal of the envelope.)

Q. Will you take off the contents of the sealed

(Testimony of C. E. Hubach.)

envelope? How many envelopes are there, sir?

A. There are twelve.

Q. And each envelope, you say, contains heroin?

A. Yes.

Q. Now, did you put your initials on each envelope? A. Yes, I did.

Q. Now, what is the measurement or the weight of that envelope [12] that you have in your hand?

A. It contains approximately 365 grains.

Q. Was that after you had taken some out for analysis? A. No, that was prior to that time.

Q. Prior.

Mr. Karesh: May it please your Honor, the envelope containing the 365 grains we will ask that it be marked as U. S. Exhibit 1 for Identification.

The Court: It will be marked for identification.

(The envelope referred to was marked U. S. Exhibit 1 for Identification.)

Q. (By Mr. Karesh): Take the next envelope and tell me how many grains is in that.

A. 380 grains.

Mr. Karesh: The envelope containing 380 grains, your Honor, we will ask be marked next in order for identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 2 for Identification.)

Q. (By Mr. Karesh): You have another envelope in your hands, sir, how many grains?

A. 384.

(Testimony of C. E. Hubach.)

Mr. Karesh: The envelope, may it please your Honor, containing 384 grains of heroin we ask be marked U. S. Exhibit 3 for Identification. [13]

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 3 for Identification.)

Q. (By Mr. Karesh): The next envelope you have in your hand, how many grains?

A. 394.

Mr. Karesh: The envelope, your Honor, containing 394 grains we ask be marked U. S. Exhibit 4 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 4 for Identification.)

Mr. Karesh: The envelope you now have in your hand, how many grains? A. 397.

Q. How much? A. 397.

Mr. Karesh: 397 grains of heroin. We ask this be marked U. S. Exhibit 5, your Honor please, for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 5 for Identification.)

Q. (By Mr. Karesh): The envelope you have in your hand contains how many grains of heroin?

A. 397.

Mr. Karesh: 397 grains. We will ask that this envelope, your Honor, be marked U. S. Exhibit 6 for Identification. [14]

The Court: So ordered.

(Testimony of C. E. Hubach.)

(The envelope referred to was marked U. S. Exhibit 6 for Identification.)

Q. (By Mr. Karesh): The envelope, sir, which you have in your hand now, contains how many grains of heroin? A. 401.

Mr. Karesh: The envelope, may it please your Honor, containing 401 grains we ask be marked U. S. Exhibit 7 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 7 for Identification.)

Q. (By Mr. Karesh): The envelope you have in your hand contains how many grains of heroin, sir? A. 412.

Mr. Karesh: This envelope containing 412 grains, if your Honor please, we ask be marked U. S. Exhibit 8 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 8 for Identification.)

Q. (By Mr. Karesh): The envelope you have in your hand, sir, contains how many grains of heroin? A. 415.

Mr. Karesh: This envelope with this 415 grains, your Honor, we ask be marked U. S. Exhibit 9 for Identification. [15]

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 9 for Identification.)

Q. (By Mr. Karesh): The envelope you now

(Testimony of C. E. Hubach.)

have in your hand, sir, contains how many grains?

A. 415.

Mr. Karesh: This envelope containing 415 grains we ask be marked U. S. Exhibit 10 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 10 for Identification.)

Q. (By Mr. Karesh): The envelope, sir, that you hold in your hand now, how many grains?

A. 424 grains.

Q. How many? A. 424 grains.

Mr. Karesh: We ask that the envelope, if your Honor please, containing 424 grains of heroin, be marked U. S. Exhibit 11 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 11 for Identification.)

Q. (By Mr. Karesh): The envelope you now hold in your hand, sir, contains how many grains?

A. 427. [16]

Mr. Karesh: We ask that this envelope, may it please your Honor, with 427 grains, be marked U. S. Exhibit 12 for Identification.

The Court: So ordered.

(The envelope referred to was marked U. S. Exhibit 12 for Identification.)

Q. (By Mr. Karesh): Now, I notice inside there is some waxed paper. Was that paper furnished you by the—will you look at it—just take

(Testimony of C. E. Hubach.)

the envelope so we won't spill any of it—was the waxed paper given you by the agent, or what?

A. This is the way it was delivered to me, as is.

Q. Those envelopes?

A. Those waxed envelopes.

Q. In the waxed envelopes inside these white envelopes, is that correct? A. Yes.

Q. And your initials appear—what are your initials? A. C.E.H.

Q. Your initials appear on each envelope?

A. Yes.

Q. U. S. Exhibits 1 to 12 for Identification. How many grains to an ounce? A. 487½.

Q. 487½? A. That is avoirdupois ounces.

Mr. Karesh: That is all of this witness.

Cross-Examination

By Mr. Deasy:

Q. Mr. Hubach, approximately what time was it on November the 1st that you received this package from the agent? A. I don't recall.

Q. Would it be in the morning or in the afternoon? A. I don't remember that.

Q. I see. And where is the container that it was in originally placed, sir, when they gave it to you?

A. Right here.

Q. May I see it, please?

(The witness produces envelope.)

Q. I see that you have two joined here together. Was it in one container or two containers?

A. It was in one container.

(Testimony of C. E. Hubach.)

Q. I see. And what was the total weight of the one to twelve exhibits that you have given to us, in grains, if you recall?

A. It was almost an even eleven ounces, just a few grains short of 11 ounces.

Q. Of 11 ounces? A. Yes.

Q. And each one of these white envelopes which have been marked as exhibits were handled by you as you took the narcotics out, is that correct? [18]

A. Yes.

Q. And the waxed paper was also handled by you, is that correct? A. Yes.

Mr. Deasy: Thank you very much. I have no further questions.

Mr. Ehrlich: No questions.

Mr. Dunning: No questions.

Mr. Kernes: No questions.

Mr. Karesh: May it please your Honor, we have called for Mr. Cass. He is an agent. He recently broke his arm. We did not think we would get started so quickly. He will be here at eleven o'clock, if we could have a recess until then.

The Court: Ladies and gentlemen of the jury, you are admonished not to discuss the facts of the case amongst yourselves or with anyone else, or permit them to be discussed in your presence or hearing. You are further admonished not to form or express any opinion upon the merits of the case until it is finally submitted to the jury.

(Recess.) [19]

RALPH KLINE

was called as a witness on behalf of the United States, and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court and jury?

The Witness: My name is Ralph Kline, Special Investigator of the Alcohol Tax Unit.

Direct Examination

By Mr. Karesh:

Q. Mr. Kline, you are an employee of the Federal government? A. Yes, sir.

Q. In what capacity are you employed?

A. Special investigator.

Q. For what? A. Of the Alcohol Tax Unit.

Q. How long have you been employed by the Alcohol Tax Unit as a special investigator?

A. As special investigator, approximately two years.

Q. Were you with the Government before that time? A. Yes, sir.

Q. For how long? A. Two years.

Q. In what capacity?

A. Deputy United States Marshal.

Q. Your duties require you to take photographs?

A. Yes, sir.

Mr. Karesh: Counsel, have you seen these photographs?

Mr. Ehrlich: No.

(The photographs referred to were thereupon handed to counsel for defense.)

(Testimony of Ralph Kline.)

Q. (By Mr. Karesh): This picture which I show you of the Hotel Clay-Ten—did you take that picture? A. Yes, sir.

Q. When? A. On June 1.

Q. 1949? A. Yes, sir.

Q. Clay-Ten Hotel is at the corner of Tenth and Clay, facing Clay; that is right, isn't it?

A. That is right, yes, sir.

Q. That is a full view of the hotel?

A. Yes, sir.

Mr. Karesh: We will ask that this be received for illustrative purposes, Your Honor.

The Court: It may be received.

(The photograph referred to was thereupon received in evidence and marked U. S. Exhibit No. 13.)

Q. (By Mr. Karesh): This picture which I show you, sir, did you likewise take it?

A. Yes, sir. [21]

Q. When? A. On the same day, June 1st.

Q. 1949? A. 1949.

Q. Is that the Clay-Ten Hotel?

A. Yes, sir.

Q. What does that photograph represent?

A. This is looking down the hall from the elevator?

Q. Is it looking in the direction of room 306?

A. Yes, sir.

Q. Is room 306 straight down the hall? Or does it veer?

(Testimony of Ralph Kline.)

A. It veers a slight bit to the right.

Q. This is just a part view of the hall, is that right, looking toward 306 or in the direction of 306?

A. Yes.

Mr. Karesh: We will ask that this be received for illustrative purposes, Your Honor, next in order.

The Court: It may be received.

(The photograph referred to was thereupon received in evidence and marked U. S. Exhibit No. 14.)

Q. (By Mr. Karesh): Did you take this photograph which I show you, sir? A. Yes, sir.

Q. When? A. June 1, 1949. [22]

Q. What does that represent?

A. This represents a view of the hall looking in the same direction as that other photograph, but from a position nearer the elevator, farther down the hall. It is a complete view of the hall.

Q. In other words, this photograph, U. S. Exhibit No. 14, represents only part of the hall?

A. That is right, sir.

Q. And that represents the entire length of the hall? A. Yes, sir.

Q. Where did you take that picture, sir? Where were you stationed when you took the picture?

A. I was as far back in the hall as I could get, near the elevator.

Q. You say that room 306 veers to the right of that picture? A. Yes, sir.

Mr. Karesh: We will ask this be received, Your Honor, for illustrative purposes.

(Testimony of Ralph Kline.)

The Court: Received.

(The photograph referred to was thereupon received in evidence and marked U. S. Exhibit No. 15.)

Mr. Karesh: May we at this time pass them out to the jury, Your Honor?

The Court: You may.

(Thereupon U. S. Exhibits 13, 14 and 15 were passed to the [23] jury.)

The Court: You may continue with the questioning.

Mr. Karesh: We are through with this witness.

Mr. Deasy: I have some questions, Your Honor, but I need the exhibits.

The Court: Very well.

Cross-Examination

By Mr. Deasy:

Q. Calling your attention, Mr. Kline, to Government's Exhibit No. 13, which is a picture of the Clay-Ten Hotel, roughly speaking, Clay Street runs north and south, does it not?

A. I am not sure. I think it does, sir.

Q. Assume for the purpose of this discussion that it does run north and south. On which side of the street was your camera when you took Plaintiff's Exhibit 13? The east or the west?

A. The camera was on the east side of the street, in a second story window on the southeast corner.

Q. I am going to call your attention, Mr. Kline,

(Testimony of Ralph Kline.)

to Government's Exhibit 14, and I am going to ask you if room 306 appears in that picture.

A. No, sir, it does not.

Q. Room 306 is beyond the corner that is shown there in the extreme easterly end of the picture; that would be the extreme easterly end, would it not? I will reframe the question and put it this way: It would be in the extreme easterly end of the hallway [24] that you took the picture?

A. Well, sir, I am not familiar with the directions to the end of the hallway.

Q. Clay Street runs north and south and this hallway runs at a right angle to Clay Street, does it not? A. I am not certain, sir.

Q. But room 306 does not appear in that picture?

A. The very edge of the door frame appears in the picture.

Q. Will you just point that out, please?

A. Right there (indicating).

Q. That would be that white line that seems to run in conformity with the other white strips, is that right, Mr. Kline?

A. Yes, you can see the door jamb.

Q. Calling your attention to Plaintiff's Exhibit No. 15, room 306 does not appear in that picture either, does it? A. No, sir.

Q. Approximately how long were you on the premises of the Clay-Ten Hotel when you took these pictures on the first of June?

(Testimony of Ralph Kline.)

A. I would say about an hour.

Q. Approximately how long were you in the vicinity of room 306 on the occasion that you took those pictures?

A. Oh, approximately ten minutes.

Q. Again calling your attention to Government's Exhibit No. 14, at this edge, do you know what is back there? Is that a solid wall or does that walkway that you see continue down there? [25]

A. It continues on for ten feet or so and terminates at the door, at the other end of a very short hall.

Q. Along this corridor of that very short hall, are there other rooms, did you notice?

A. To my knowledge, there was a room at the extreme end, either a broom closet or lavatory to the left looking down the hall. That is all.

Q. Excuse me. I do not mean to interrupt you.

A. That is all, I am sure.

Q. As you were going away from Room 306 down this little hall that you described as being about ten feet long, you noticed what appeared to be a lavatory or broom closet, is that correct?

A. Yes, sir.

Q. Would that be to your left as you were going away from Room 306 or to your right?

A. It would be to the left looking down the hall. I never went down the hall, sir. I turned and came back through this hall.

Q. As you are looking down the hall, you are

(Testimony of Ralph Kline.)

looking away from Room 306? A. Yes, sir.

Q. Then it would be to your left, and you were going away from Room 306?

A. That is right.

Q. Approximately how much distance in feet is there between this wall, sir, which appears in Government's Exhibit 14, and [26] the opposite wall, which starts at the beginning of this little ten-foot corridor which you spoke about?

A. I did not measure it, sir.

Q. Can you give me your best approximation, if you can?

A. I would say approximately five feet.

Mr. Deasy: Thank you very much. I have no further questions.

The Court: Any further questions from defense counsel?

(No other defense counsel indicated a desire to question the witness.)

Redirect Examination

By Mr. Karesh:

Q. Some mention was made of a bathroom or lavatory by counsel for one of the defendants. This picture I show you, can you identify it and tell us where it was taken from?

A. It was taken from inside Room 306 looking down the small hall, the hall that we have spoken of.

Q. I did not quite hear you. What did you say?

A. That is looking from Room 306 directly towards the end of the hall, and the lavatory and broom closet I mentioned.

(Testimony of Ralph Kline.)

Q. This was taken inside Mr. Leeper's room?

A. Yes, sir.

Q. And this hall represents the hall we spoke about from the main hall that veers to the right?

A. Yes, sir.

Q. Directly across you see that lavatory? [27]

A. Yes, sir.

Q. That lavatory, of course, was not inside any room; it is a hall lavatory, is that right?

A. Yes, sir.

Mr. Karesh: We will ask that this be received in evidence, if Your Honor please, for illustrative purposes.

The Court: It may be received.

(The photograph referred to was thereupon received in evidence and marked United States Exhibit No. 16.)

Mr. Karesh: May I show this to the jury, Your Honor?

The Court: Very well.

Mr. Karesh: Any other questions?

Recross-Examination

By Mr. Deasy:

Q. Approximately how far inside Room 306 were you when you took the picture that is portrayed in Government's Exhibit No. 16?

A. Is this the exhibit the jury has now?

Q. That is correct.

A. I was approximately ten feet—about ten feet inside of the room where I took the picture.

(Testimony of Ralph Kline.)

Mr. Karesh: Thank you very much. I have no further questions.

Mr. James Eagan. [28]

JAMES F. EAGAN

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. James F. Eagan.

Direct Examination

By Mr. Karesh:

Q. Mr. Eagan, you are a Deputy United States Marshal for the Northern District of California?

A. I am.

Q. You are assigned to the San Francisco office?

A. Yes.

Q. You are the Chief Deputy in charge of the criminal division of the Marshal's Office, is that right? A. Yes.

Q. One of your duties is the taking of fingerprints, is that correct? A. Yes.

Q. Did you take the fingerprints of John Stoppelli? A. I did.

Q. Do you recognize Mr. Stoppelli in the courtroom?

A. No, I do not believe I do.

Q. But you took the prints of John Stoppelli. Is that the prints?

A. That is the prints.

(Testimony of James F. Eagan.)

Q. When did you take them? [29]

A. February 24. It says "1948" here.

Q. Were they taken in 1948 or were they taken on February 24, 1949? A. 1949.

Q. Do you have an independent record of that that reflects the true date of the taking of the fingerprints?

A. The two dates on the front in my handwriting in 1948; on the back is typewritten 1949.

Q. You do have a notebook, have you not, in which you put down the date on which these fingerprints were taken? A. Yes.

Q. Where is the notebook, Mr. Eagan?

A. It is there (indicating).

Q. Where? A. At the end of the desk.

The Court: Do counsel for the defense wish to see the book?

Mr. Ehrlich: No. If Mr. Eagan says he took those on that particular date, that is agreeable.

Q. (By Mr. Karesh): That reflects John Stoppelli, February 24, 1949, is that correct?

A. Yes.

Q. Do you know who arrested John Stoppelli or did he surrender? A. He surrendered.

Q. Into your office? Did the counsel bring him in, Mr. Ehrlich, do you remember? [30]

A. I haven't a good recollection of that.

Q. You do not know one way or the other?

A. I do not.

Mr. Ehrlich: I will stipulate, Mr. Karesh, that he surrendered voluntarily on the date in question.

(Testimony of James F. Eagan.)

Mr. Karesh: By voluntarily you mean he was on bond to appear in San Francisco and we brought him in?

Mr. Ehrlich: He came here from New York.

Mr. Karesh: Under bond.

Mr. Ehrlich: He came voluntarily. He placed bond in New York and came here at his own expense.

Mr. Karesh: By Stoppelli you mean your client?

Mr. Ehrlich: I mean the defendant Stoppelli.

Mr. Karesh: May we ask that this print card be marked for identification, Your Honor?

The Court: It may be marked for identification.

(The fingerprint card referred to was thereupon marked United States Exhibit No. 17 for identification.)

Mr. Karesh: That is all.

Mr. Ehrlich: That is all.

The Court: That will be all.

C. T. CASS

was called as a witness on behalf of the United States, and being first duly sworn, testified as follows: [31]

The Clerk: What is your full name?

A. C. T. Cass.

Direct Examination

By Mr. Karesh:

(Testimony of C. T. Cass.)

Q. Mr. Cass, you are an agent of the Bureau of Narcotics? A. Yes, sir.

Q. How long have you been an agent?

A. 23 years.

Q. You are assigned to the San Francisco office?

A. Yes, sir.

Q. Calling your attention to October 31, 1948, were you in the vicinity of the Clay-Ten Hotel at Tenth and Clay Streets, Oakland?

A. Yes, sir.

Q. Did you go over there by yourself?

A. I was accompanied by Agent Bertin and Agent Grady, Agent Coffill, and District Supervisor Mr. White.

Q. Did you go in the same car with Mr. White?

A. No, I drove a different car than Mr. White.

Q. On that date did you receive a certain package from District Supervisor White?

A. At about 6:00 o'clock in the evening, October 31, when we returned from Oakland, Mr. White delivered to me a white paper sack containing some envelopes, white envelopes.

Q. Are you sure it was a white paper sack?

A. Manila colored sack. [32]

Q. Look in this envelope or in that package, and tell me, do you identify what is in there?

A. This is the sack.

Q. What was inside this paper sack when Agent White turned it over to you?

(Testimony of C. T. Cass.)

A. Some white, I would say, regular, ordinary letter envelopes.

Q. Was this envelope in this condition at the time you received it or has the envelope been treated for prints?

A. The envelope has been treated for prints.

Q. This bag, rather.

A. The sack wasn't torn up like this. It was a regular sack. It was not discolored like this.

Q. What was inside this paper sack on which you put your initials?

A. There were white letter envelopes.

Q. What was in the white envelopes?

A. There was a white substance.

Q. A white substance?

A. Contained in cellophane. It was first an envelope, and in that envelope there was a cellophane bag, and in that cellophane bag there was a white substance, powder.

Q. In other words, first there was this big bag, and inside the bag some white envelopes?

A. Yes.

Q. How many envelopes were there?

A. I can't recall now. [33]

Q. Did you put your initial on each envelope?

A. I did.

Q. Inside each envelope there were some cellophane bags like this? A. That is correct.

Q. In that condition or has that been treated?

A. This has been treated. This is all spotted, spotted and wrinkled.

(Testimony of C. T. Cass.)

Q. And in each one of the cellophane bags there was a white substance? A. White powder.

Q. What did you do with the bags? Did you empty the heroin from the bags?

A. On the morning of November 31st——

Q. What date did you say?

A. The morning of November 1st, I took the paper sack and the envelopes out of the bag, I put on some rubber gloves, I opened the packages, I removed the contents, and put them in a different envelope and turned this and the paper envelopes, after initialing them, over to Mr. Grady, who was present at that time.

Q. In other words, you took the white powder out of the cellophane envelope and you took the envelopes in which the cellophane was, and you took this bag and gave all that to Mr. Grady?

A. Yes.

Q. And you put the powder, you say, in other white envelopes? [34] A. Yes.

Q. What did you do with the powder you put in the white envelopes?

A. Put it in a package and took it to Mr. Lovett, the chemist, downstairs.

Q. You took it down to the United States Chemist in San Francisco? A. The chemist.

The Court: November 1st you did this?

A. Yes, sir, the next morning.

Q. (By Mr. Karesh): On these white envelopes that you turned over to the chemist, did you put

(Testimony of C. T. Cass.)

your initials, Mr. Cass? A. Yes.

Q. Is this one of the envelopes that you took over to the chemist?

A. Yes, I weighed them and put my initials and the date.

Q. Your initials are on U. S. Exhibit 1 for identification. This is U. S. Exhibit 2 for identification. Give me back the other one. Hold the second one. You put your initials on that before you sent it over to the chemist? A. Yes, sir.

Q. And you turned it over to the chemist, is that right? A. Yes, sir.

Q. Are your initials on U. S. Exhibit 3 for identification? A. Yes, sir. [35]

Q. You turned that over to the chemist on November 1st? A. Yes, sir.

Q. U. S. Exhibit 4 for identification, with its contents, did you turn that over to the chemist?

A. Yes, sir.

Q. With your initials on that package?

A. Yes.

Q. When I said turn the envelopes, I mentioned U. S. Exhibits 1, 2 and 3 for identification—you turned the envelopes plus the contents over to the chemist? A. That is correct.

Q. U. S. Exhibit No. 5 for identification, you turned that and its contents over to the chemist on November 1st? A. Yes, sir.

Q. U. S. Exhibit 6 for identification with its contents, did you turn it over to the chemist on

(Testimony of C. T. Cass.)

November 1st? A. I did, yes, sir.

Q. Marked your initials on it?

A. Yes, sir.

Q. U. S. Exhibit 7 for identification, with its contents, did you turn that over to the chemist?

A. Yes, sir.

Q. November 1st?

A. November 1st. My initials are in the corner.

Q. United States Exhibit 8 for identification with its contents, [36] did you turn that over to the chemist on November 1, 1948?

A. Yes, sir. My initials are there.

Q. United States Exhibit 9 for identification, did you turn that and its contents over to the chemist on November 1, 1948?

A. Yes, sir, my initials are there.

Q. U. S. Exhibit 10 for identification, did you turn that over on November 1st, 1948, with its contents to the chemist? A. Yes, sir.

Q. Did you mark your initials on it?

A. They are right there.

Q. Initialed C. T. C.? A. Yes, sir.

Q. U. S. Exhibit 11 for identification, did you turn that over to the chemist on November 1, 1948, with its contents?

A. Yes, sir, there are my initials, C. T. C.

Q. U. S. Exhibit 12 for identification, with its contents, did you turn that over to the chemist on November 1, 1948?

A. Yes, my initials are there.

(Testimony of C. T. Cass.)

Q. I notice in each one of these envelopes, U. S. Exhibit 1 through 12 for identification, that there is a cellophane wrapper or bag.

A. Yes, sir, I got the bags and I transposed over the one envelope, weighed it, and at that time I turned the two containers and the brown paper bag over to Agent Grady.

Q. In other words, this bag and this cellophane bag—this [37] envelope and this cellophane bag are not the originals or cellophane bags that you received from Supervisor White? A. No.

Q. In other words, you emptied this white powder from the original containers and put it in the cellophane bag inside the envelope?

A. I did.

Q. Twelve of them, and turned it over to the chemist? A. Yes, sir.

Q. All on November 1, 1948, and all contained, you say, the white powder? A. Yes, sir.

Q. You have already identified this paper sack. You say you received it from Col. White and your initials "C. T. C." are on it, is that right?

A. Yes, sir.

Mr. Karesh: We will ask this be marked for identification, Your Honor, next in order.

The Court: It may be marked.

(The sack referred to was thereupon marked U. S. Exhibit No. 18 for identification.)

Q. (By Mr. Karesh): Look in this envelope and tell me what is in there, and if you have ever

(Testimony of C. T. Cass.)

seen the contents before. I know it is rather difficult with your hand like that.

A. This one here—I can see my initials on that. That is one [38] of the containers that was in the original package.

Q. In other words, you have twelve of these bags, is that right?

A. Some of them you have to get in the light to see the initials.

Q. How many of them do you have there, Mr. Cass? Just count them. We will look at them later.

A. Eleven.

Q. Is there another one in there?

A. Yes, twelve.

Q. Each one of these cellophane packages contained white powder, each one came from an envelope, a larger envelope, which came from the paper bag which you got from Supervisor White, is that correct?

A. Some of them I can distinguish my initials on. I can see my initials there but it would take time.

Q. But they were all similar?

A. Yes, these are all similar. Some I see my initials on; some it will take time.

Q. But you received these from Supervisor White?

A. Yes.

Mr. Karesh: We will ask that all these envelopes be marked as one exhibit for identification.

The Court: So marked.

(Testimony of C. T. Cass.)

(The envelopes referred to were thereupon marked United States Exhibit No. 19 for identification.)

Q. (By Mr. Karesh): Do you recognize those envelopes? [39]

A. Yes, sir, that one has my initials.

Q. I can't hear you and I do not think the jury can hear you. Go ahead.

A. That is my initials. That is one of the envelopes.

Q. Let us take them one at a time, Mr. Cass. Do you recognize this envelope which I show you?

A. Yes. It has my initials on it.

Q. What is that envelope?

A. That is one of the original containers, the envelopes that contained the cellophane bag that was in the brown paper.

Q. With the heroin inside the brown paper bag; did you mark your initials on it?

A. Yes, sir, right here.

Q. Was it in that condition when you received it or was it a white envelope?

A. It was a white envelope. This was from treating it with chemicals.

Q. To determine prints, is that right?

A. Yes, sir.

Mr. Deasy: Mr. Karesh, you are discussing something which has not been marked as yet, is that correct?

Mr. Karesh: We have not marked these as yet.

(Testimony of C. T. Cass.)

We will mark them at one time.

Mr. Deasy: We can't see them from here. Just tell us and we would appreciate it. [40]

Mr. Karesh: I am sorry, counsel.

Q. I notice a piece of paper torn from here. Is that the condition in which you received the envelope from Col. White? Were they sealed or what?

A. No, that is where it was torn open in opening them.

Q. Who opened them? A. I opened them.

Q. When you received the envelope with its contents, was that envelope sealed?

A. Yes, sir.

Q. And you broke it open?

A. I tore the corner open and took the contents out. It being wet, the glue went back in position again.

Mr. Karesh: We will ask that this envelope be marked next in order for identification.

The Court: So ordered.

(The envelope referred to was thereupon marked United States Exhibit No. 20 for identification.)

Q. (By Mr. Karesh): Let us look at this envelope which I am showing you.

Am I in your way?

Mr. Deasy: You referring to the envelopes?

Mr. Karesh: Yes. If I do not stand in your way, I am in the jury.

(Testimony of C. T. Cass.)

The Witness: These are my initials (indicating). It is [41] dated 11/1/48.

Q. Did you receive that under the same circumstances as you got the envelope that I just offered and which was received for identification?

A. Yes, sir.

Q. For the record, just say what happened. What does it represent?

A. This is one of the envelopes that were in that paper bag, that I removed the contents and turned this envelope over to Agent Grady.

Q. You received this from Col. White on what day?

A. On October 31, 1948, at about 6:00 p.m.

Q. Six in the evening? A. Yes.

Mr. Karesh: May this be marked for identification, Your Honor?

The Court: Yes.

(The envelope referred to was thereupon marked United States Exhibit No. 21 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, from whom did you receive it and what was in it?

A. This is envelope No. 5 that was in that brown paper bag turned over to me by District Supervisor White, and which contained a brown substance. I removed the brown substance and turned this envelope over to Agent Grady. [42]

Q. Brown or white substance?

(Testimony of C. T. Cass.)

A. Brown and white, a cross between white and brown.

Q. Mostly white?

A. It is mostly white, yes.

Q. It is a white powder?

A. I would say it is white. Some of it is brown, sometimes white.

Mr. Karesh: We will ask that this be marked next in order.

(The envelope referred to was thereupon marked United States Exhibit No. 22 for identification.)

Q. (By Mr. Karesh): This envelope that I show you, from whom did you get it, what did it contain, if anything, and when did you get it?

A. This is an envelope marked "C. T. C., 11/1/48." This is another envelope I received from Mr. White, from which I removed the contents, a whitish powder, and turned it over to Agent Grady.

Mr. Karesh: We will ask that this be marked for identification.

(The envelope referred to was thereupon marked United States Exhibit No. 23 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, from whom did you receive it, when, and what did it contain, if anything?

A. This envelope, Envelope No. 9, "C. T. C.," this is one of the envelopes that I also received from Mr. White, which contained [43] a powder in it,

(Testimony of C. T. Cass.)

which I removed and turned this container over to Agent Grady.

Q. It came out of that paper sack, right?

A. Yes.

Mr. Karesh: May this be marked for identification?

The Court: It may.

(The envelope referred to was thereupon marked United States Exhibit No. 24 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, from whom did you get it, when, and what was in it?

A. This is another envelope with my initials, the date which I received——

Q. What date?

A. November 1, 1948.

Q. Go ahead.

A. Which I received from District Supervisor White, and which contained the cellophane bag.

Q. With the powder?

A. Whitish powder, which I removed and turned this container over to Agent Grady.

Mr. Karesh: May this be marked next for identification, Your Honor?

The Court: Yes.

(The envelope referred to was thereupon marked United States Exhibit No. 25 for identification.) [44]

Q. (By Mr. Karesh): This envelope which I

(Testimony of C. T. Cass.)

show you, Mr. Cass, from whom did you receive it, when, what was in it, and what did you do with it?

A. This is my initials, dated 11/1/48, No. 6. It is among the envelopes I received from District Supervisor White, and from which I removed the contents.

Q. The powder?

A. The powder, and turned over to Agent Grady.

Mr. Karesh: We ask this be marked for identification, Your Honor, next in order.

The Court: So ordered.

(The envelope referred to was thereupon marked United States Exhibit No. 26 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, from whom did you receive it, when, and what was in it, and what did you do with it?

A. This envelope is marked with my initials, No. 12, 11/1/48, was among those that I received from District Supervisor White, from which I removed the powder, placed it in another container and turned this container, the original container, over to Agent Grady.

Q. That was on November 1, 1948?

A. November 1, 1948.

Mr. Karesh: May this be marked next for identification, Your Honor? [45]

The Court: So ordered.

(The envelope referred to was thereupon

(Testimony of C. T. Cass.)

marked United States Exhibit No. 27 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, from whom did you receive it, when, what was in it, and what did you do with it after you saw it? Do you recognize that?

A. It is all blurred here. The number is there—

Q. Is the number in your handwriting? Would you say that you turned that envelope over to Mr. Grady?

A. I can't say because it is too blurred.

Q. You say it is too blurred?

A. If I had a magnifying glass, but as it is now, I can't tell.

Q. It has other initials on it. Do you recognize those initials?

A. I recognize the other initials, yes.

Q. Whose initials are they?

A. William H. Grady.

Q. W.H.G.?

A. Yes. That is, this here could possibly be it, but I can't say.

Q. You say it could possibly be yours?

A. Yes.

Q. You do not know until you have looked under a magnifying glass? A. No. [46]

Q. Did you put your initials on all the envelopes?

A. Yes, I did.

Q. How many envelopes did you get from Col. White?

(Testimony of C. T. Cass.)

A. I don't recall now whether it was twelve, eleven or twelve. I don't recall.

Mr. Karesh: We will ask this be marked for identification next in order, Your Honor.

(The envelope referred to was thereupon marked United States Exhibit No. 28 for identification.)

Q. (By Mr. Karesh): This envelope which I show you, can you identify that and tell me from whom you got it, when, and what did you do with that?

A. This is marked 7, 11/1/48, with my initials, "C.T.C." This is an envelope from which I removed the powder and turned this original container over to Agent Grady.

Mr. Karesh: We will ask this be marked for identification next in order, Your Honor.

The Court: So ordered.

(The envelope referred to was thereupon marked United States Exhibit No. 29 for identification.)

Q. (By Mr. Karesh): This envelope that I show you, from whom did you receive it, when, what did you do with it, and what was in it?

A. This is an envelope marked No. 10, C.T.C., 11/1/48. This is an envelope from which I removed the contents powder, and [47] turned this original container over to Agent Grady.

Mr. Karesh: We will ask that this be marked next in order for identification, Your Honor?

The Court: So ordered.

(Testimony of C. T. Cass.)

(The envelope referred to was thereupon marked United States Exhibit No. 30 for identification.)

Q. (By Mr. Karesh): Can you identify this envelope which I show you, Mr. Cass? Tell me if you can, from whom you got it, what was in it, if anything, what did you do with it?

A. This is marked No. 8, C.T.C., 11/1/48. This is an envelope that contained a whitish substance and which I removed and turned over to Agent Grady for further investigation.

Mr. Karesh: I will ask this be marked next in order for identification.

The Court: So ordered.

(The envelope referred to was thereupon marked United States Exhibit No. 31 for identification.)

Q. (By Mr. Karesh): Let me get this straight for the sake of clarification, Mr. Cass: On November 1, 1948, District Supervisor White gave you a paper bag. Inside the paper bag were twelve envelopes, and inside the envelopes were twelve cellophane bags, and inside the twelve cellophane bags was the white powder, is that right? A. No.

Q. Explain. [48]

A. It was October 31.

Q. I mean October 31. Pardon me. With the exception of the date, that is what happened?

A. Yes, sir.

Q. Then what did you do on November 1, 1948?

(Testimony of C. T. Cass.)

Am I correct in this, that you emptied the contents of the cellophane bag and put them in other cellophane wrappers, put them in envelopes, and turned them over to the chemist?

A. Put them in glassine bags.

Q. You have identified the glassine bags?

A. Yes.

Q. You put the glassine bags in envelopes and then turned it all over to the chemist?

A. That is correct.

Q. That is the white powder. Now, tell me: I notice these envelopes here, U. S. Exhibits for identification from 20 through 31, they are discolored and torn. Were they in that condition when Mr. White gave them to you? A. No.

Q. What happened to them? What was the condition when you got them?

A. The condition of the envelopes was sealed.

Q. Were they white envelopes?

A. Ordinary white—what you would call commercial letter envelopes.

Q. All the same kind? [49]

A. Yes, I would say they were similar in appearance.

Q. Were they all the same length, Mr. Cass?

A. Yes.

Q. And all sealed? A. Yes.

Q. And all white? A. Yes.

Q. You turned them over to Mr. Grady in that condition; they were treated chemically?

(Testimony of C. T. Cass.)

A. I did.

Q. The tears, of course, were not there when you received them from Mr. White, is that correct?

A. No, that is tears when I tore them open to take the container out, and they were soaking probably in this solution.

Q. Tell me, when you took them out of the paper bag, those envelopes, did you use gloves?

A. I did, I used rubber gloves.

Q. So you did not get your prints on the envelopes, is that right? A. Yes.

Mr. Kāresh: That is all.

(Each of counsel for the defense indicated he did not desire to question the witness.)

The Court: That will be all. [50]

GEORGE H. WHITE

called as a witness on behalf of the United States,
sworn.

Direct Examination

By Mr. Karesh:

Q. Mr. White, your full name is what, sir?

A. George H. White.

Q. Mr. White, you are an employee of the United States? A. Yes, sir.

Q. How long have you been an employee of the United States? A. 16 years.

Q. And in what position—what positions did you hold for 16 years?

A. Narcotic agent, and Narcotic district supervisor.

(Testimony of George H. White.)

Q. You are at present narcotic district supervisor for this district? A. Yes, sir.

Q. And how long have you been Narcotic District Supervisor? A. Since August 1945.

Q. During the war you were in the armed forces?

A. Yes, sir.

Q. And you were in the offices of the Strategic Services, and you left the service with the rank of Lieutenant Colonel, is that correct?

A. Yes, sir.

Q. Now, calling your attention to October 31, 1948, did you see an informer on that day? [51]

A. Yes, sir.

Q. Where did you see him and about what time?

A. About 3:00 p.m.—at about 2:30 p.m., 305 Bush Street.

Q. Did you then go to Oakland with the informer? A. I did.

Q. How did you get to Oakland?

A. Drove in the informer's car.

Q. Anyone with you in the car when you drove across to Oakland?

A. Just the informer.

Q. Just the informer?

A. Just the informer.

Q. Did you then go to the vicinity of the Clay-Ten Hotel? A. Yes, sir.

Q. What happened there?

A. I entered the Clay-Ten Hotel with the informer, whose name is Charles Mallibee and waited

(Testimony of George H. White.)

in the lobby—this was at about 3:30 p.m. Mallibee went up, then came down in about three minutes——

Q. Just a minute. You have seen the picture that has been marked for identification, Clay-Ten Hotel? That is the Clay-Ten Hotel that you were speaking about, isn't it? A. Yes, sir.

Q. Go ahead.

A. I then went ahead with the informer to Room 306.

Q. Now, may I ask you this question: Did any other agents [52] follow you over that day?

A. Yes, sir. I was followed by Agent Cass, Bertin, Grady and Coffill.

Q. Did they come in a separate automobile?

A. Yes, sir.

Q. A government car? A. Yes, sir.

Q. You say you went to the lobby of the Clay-Ten Hotel? A. Yes, sir.

Q. What happened to the informer when you first went in, did he stay with you or did he leave?

A. He went upstairs.

Q. Did he use the elevator? A. Yes, sir.

Q. Go ahead.

A. The informer came downstairs in about three minutes and then I accompanied the informer upstairs.

Q. Did you go up the elevator?

A. Yes, sir.

Q. Where did you go?

A. We went to Room 306.

(Testimony of George H. White.)

Q. Of the Clay-Ten Hotel? A. Yes, sir.

Q. Then what happened?

A. The informer knocked on the door, the door was opened by the [53] defendant Leeper——

Q. Now, by “Leeper,” whom do you mean?

A. I mean the gentleman sitting back of counsel holding the cane.

Mr. Karesh: May the record show the witness has identified the defendant Raymond Leeper, Your Honor—this gentleman I am pointing to with the cane? A. Yes, sir.

Q. Go on. Tell us what happened.

A. We entered the room; I was introduced to Mr. Leeper as John Wilson. The informer said to Leeper, “Johnny is the man I was telling you about.”

Q. What name did you use over there?

A. John Wilson.

Q. Go ahead.

A. Leeper said he was glad to know me.

Mr. Dunning: Just a moment. On behalf of the defendant Ingoglia I am going to object to the conversation on the ground it is hearsay, not binding on the defendant Ingoglia.

The Court: That is true under the substantive defense, unless it is connected up later to him.

Mr. Karesh: We ask that Your Honor reserve the ruling until all the evidence is in.

The Court: Well, I will say this at the present time, it is received solely against this one defendant,

(Testimony of George H. White.)

and if later on the [54] evidence justifies, I will broaden the ruling to cover the defendant or defendants it relates to.

Mr. Karesh: Yes, Your Honor.

Mr. Dunning: Exception.

Q. (By Mr. Karesh): Go ahead, Colonel.

A. We sat down, the informer then said, "There is no point in my staying around. I will leave you two together."

I told the informer I would see him later and he departed.

I then had a conversation with Leeper——

Q. Anybody else in the room after the informer left?

A. Leeper and myself were alone.

Q. All right, tell us the conversation.

A. I showed—Leeper asked me if I had the money. I showed him a paper sack which contained approximately \$10,000 and exhibited the money to him. Leeper told me that the narcotics business was not his regular racket. He said that he was a professional gambler and also specialized in buying and selling of gold, that he had had some bad luck in the gold business and that he saw a chance to get on his feet in the narcotics business.

He told me that he had a source of supply for heroin of high-quality——

Q. Did he say where it came from?

A. Yes, it came from New York, and that he would be able to supply me with two kilograms a week if I could take that much.

(Testimony of George H. White.)

Q. What is a kilogram? [55]

A. A kilogram is about two and a quarter pounds.

Q. Go ahead. Anything said about the price of heroin?

A. I asked how much he was asking for the heroin in those quantities, and he said \$900 an ounce. I told him that the price was excessive in kilo quantities.

He said that he had for immediate sale to me twelve ounces of heroin which he would sell me for \$900 an ounce. He said that after I had tried this heroin and found that it was of high quality and undiluted that he would then be able to discuss with me the price of heroin in larger quantities.

I asked him where the heroin was and he said he had sent Slim for it.

This conversation took about ten minutes, and at that time—just at about that time Leeper said to me, “When these people come, I don’t want them to see you and they don’t want you to see them, and when they come, you must go into the bathroom.”

Q. The bathroom inside of Leeper’s room?

A. Yes, sir.

Q. Go ahead.

A. Shortly after there was a knock on the door—

Q. Could I interrupt you and ask you could you call Leeper’s room a small room or a large room?

A. It was an average sized hotel room containing a bed.

(Testimony of George H. White.)

Q. How far would you say from the entrance door of 306 was the bathroom? [56]

A. About ten feet.

Q. Incidentally, did you go to the bathroom?

A. Yes, sir.

Q. Into the bathroom? A. Yes, sir.

Q. Then what happened?

A. Then I came out of the bathroom.

Q. Go ahead; just tell us what happened.

A. While standing in the doorway of the bathroom, I saw Mr. Leeper open the door.

Q. You had already heard a knock, is that correct?

A. Yes, sir. He opened the door about six inches and without leaving the room reached his right hand through the opening in the door and when he brought his hand back in, it contained a paper sack. At that time I had walked out of the bathroom and was walking toward him, he handed me the sack and said, "Here's the stuff." I continued to walk towards the door, opened the sack and saw that it contained a number of white packages.

Q. Go ahead.

A. I proceeded directly without stopping, to the door of Room 306 and pulled it open.

Q. From the time you heard the knock to the time you pulled the door open—from the knock on the door until the door was opened, what period of time would you say elapsed?

(Testimony of George H. White.)

A. From the time I first heard the knock until Leeper opened the [57] door himself, I would say a period of five seconds elapsed and from the time Leeper pulled the package into the room until the time I opened the door would be another five or six seconds.

Q. Go ahead; what happened?

A. I pulled the door and I then saw two men standing, whom I identified as the defendants James Ballard and Andrew Ingoglia.

Q. Whom do you mean as James Ballard?

A. James Ballard is the young man sitting next to Mr. Leeper.

Q. Who is the man you are speaking about (indicating)?

A. Yes, sir.

Mr. Karesh: May the record show the witness has now identified the defendant James Ballard, Your Honor.

Q. Who else was standing outside the door?

A. Andrew Ingoglia, who is the defendant in the gray suit seated on the end—not on the end, he is fourth from Mr. Leeper.

Q. You mean this gentleman here (indicating)?

A. Yes, sir.

Mr. Karesh: May the record show the witness has now identified the defendant Andrew Ingoglia, Your Honor.

Q. Now, what is the physical setup? Which way were they facing?

A. When I opened the door, they were within two feet of Room 306.

(Testimony of George H. White.)

Q. Facing into the room?

A. Facing me as I opened the door. [58]

Q. Then what did you see and what happened?
Just go on.

A. I told them I was a Federal Narcotics officer and I exhibited a pistol and told them that they were under arrest.

Q. What was said?

A. Ingoglia said, "What is this all about?" And Ballard said, "What is this?" As they said that, they backed away from me, backed into the main hall of the hotel.

Q. Now, can I interrupt you and ask you, from the time that you first went out until the time you opened the door and saw Ballard and Ingoglia, did you hear any noise if another door was opening and shutting? A. No, sir.

Q. Now, did you look past the room at the time you first accosted them and see whether the bathroom across the hall's door was open or shut?

A. It was open.

Q. Did you look into the bathroom before you took the defendants into the room?

A. I did.

Q. Was there anyone in the bathroom across the hall? A. No, sir.

Mr. Karesh: May I have the photograph of the bathroom? This is United States No.—what is it, Mr. Clerk?

The Clerk: No. 16.

Q. (By Mr. Karesh): You are looking at, am

(Testimony of George H. White.)

I correct, out of [59] the room into this bathroom and then you go look in that bathroom and the door is open and no one is in there, is that right?

A. Yes, sir.

Q. And the door immediately to the right looking outside the room, was that open or shut?

A. Shut.

Q. And you heard no noise from that door, is that right?

A. No, sir.

Q. Tell us then what happened.

A. As I followed Ballard and Ingoglia who were retreating from the entrance of the room 306 into the hall, I had an unobstructed view of the hall and saw no other persons in that hall. I ushered—

Q. By hall, you mean the hall looking into the bathroom and also the long hall?

A. Yes, sir.

Q. —that you had come down from the elevator. By the hall you mean this hall here, U. S. Exhibit 16, you looked down that hall (exhibiting photograph to witness)?

A. Yes, sir. This is looking from the opposite end toward the room. I was standing at the far end of this picture.

Q. You looked all the way down to the elevator and you saw no one in the hall?

A. No, sir.

Q. The only two people you saw were the defendants you described, Ballard and Ingoglia, is that right?

A. Yes, sir.

Mr. Karesh: May we take the recess at this time, Your Honor?

(Testimony of George H. White.)

The Court: Ladies and gentlemen of the jury, and counsel, there will be memorial services in Judge Roche's courtroom at 2:00 o'clock this afternoon in honor of the late Judge St. Sure, so the recess this afternoon will be until 3:00 o'clock. The jury was instructed and admonished prior to the last recess on certain obligations of the jury, and you are expected and admonished to observe that admonition at each recess and adjournment.

(Thereupon an adjournment was taken until 3:00 o'clock p.m. this date.) [61]

Afternoon Session, Tuesday, June 7, 1949

GEORGE H. WHITE

(Recalled)

Direct Examination

(Resumed)

The Court: You may proceed.

Mr. Karesh: Mr. Reporter, would you read the last question and answer prior to the recess?

(Record read.)

Q. (By Mr. Karesh): I think you have already testified that you saw the defendants Ballard and Ingoglia in front of the door, and will you again tell us, for the sake of continuity, the first word you spoke to them outside the door when it was first opened?

A. I told them I was a Federal narcotic agent and that they were under arrest.

(Testimony of George H. White.)

Q. Now, did you ask them about a package outside the door? A. No, sir.

Q. Now, you took them into the room, Ballard and Ingoglia, and then just what was said by each of the defendants, if anything, there, and what was done?

A. I asked both of the defendants Ingoglia and Ballard where they had got the package which I was then holding in my hand, which was the package I had taken from Leeper. Both Ingoglia and Ballard——

Mr. Karesh: Just a moment, just a moment. Would you let me have the paper sack? [62]

Q. Is this the paper sack? Did you put your initials on it?

A. Yes, sir, I wrote my name on it.

Q. Your name. Was the sack in that condition when you first saw it?

A. No, it was in the form of a sack and not in the form of a flat piece of paper.

Q. And did it have all the discolorations on it at the time?

A. It did not have the discolorations on it. Both Ballard and Ingoglia said they had never seen the package before.

Q. Did you ask it of them separately?

A. Yes, sir.

Q. Just recount what you said to each one and what each one said back to you, as best as you can remember at this time.

(Testimony of George H. White.)

A. I asked Ballard if he had seen the package before, and he said he had never seen it before, I asked Ingoglia if he had ever seen the package before, and he said he had never seen it before.

Q. At that time did you ask Ballard and Ingoglia their names?

A. Immediately thereafter—upon first coming into the room I searched both Ingoglia and Ballard for weapons and found none.

Q. Go ahead.

A. I then asked Ballard what his name was, and he said that his name was James Ballard. I asked him what he did for a living and he said that he was a taxidriver. I asked Ingoglia what his name was and he said it was Andy Bruno. I asked him if he was also known as Ingoglia and he said that he was. I asked—— [63]

Q. Now, at this time did Leeper and Ballard and Ingoglia exchange any conversation each with the other? A. No, sir.

Q. Did they appear to know each other, act as though they knew each other?

Mr. Deasy: Objected to on the ground it calls for an opinion and conclusion.

The Court: Sustained.

Q. (By Mr. Karesh): There was no conversation between them, no one spoke to each other?

A. No, sir.

Q. Go ahead.

(Testimony of George H. White.)

A. I then ordered Ingoglia, Ballard and Leeper to lie on the floor, which they did.

Q. Now, let me interrupt you for a second. Going back to the original conversation that you had with Leeper, you were posing as what?

A. As a gangster and dope peddler.

Q. He didn't know that you were an agent of the Bureau of Narcotics, did he? You didn't tell him that?

A. Not at the outset, no, sir, not until I placed him under arrest.

Q. Go ahead.

A. While they were lying on the floor I asked if they had seen anyone in the hall while they were standing outside there. They [64] said——

Q. By "them" whom do you mean, Mr. White?

A. Referring to Ballard and Ingoglia.

Q. What did they say?

A. They said that they had not. I asked what were they doing there. Ballard said that he came to see Leeper about a job on the railroad.

Q. Go ahead.

A. Ingoglia said he was just waiting for a fellow.

Q. Just waiting for a fellow?

A. I asked him what fellow, who the fellow was, and he said. "Just waiting for a fellow."

Q. Go ahead.

A. I then went to the telephone and telephoned to the desk clerk, and told him that I was a Federal officer and had three men in custody, and asked him to call the police.

(Testimony of George H. White.)

Q. Go ahead.

A. I waited about—during that time Leeper first complained about lying on the floor was very painful to him because of his injured hip, and asked to be allowed to get up and sit on the bed, and I told him that he could get up and sit on the bed, and he did. Leeper then said, “Of course, these fellows have nothing to do with this. You have got me, but they had nothing to do with it.”

Q. Go ahead.

A. I waited about five minutes and the police had not yet arrived. [65] I opened the window of the hotel and fired a shot out of the window into the air.

Q. Go ahead.

A. Shortly thereafter the police officers and the agents who were down in the street came up in the room.

Q. Now, did you ask either Ballard or Ingoglia how they got to the hotel?

A. No, sir.

Q. Did you ask Leeper how these men got to the hotel?

A. No, sir.

Q. Now, how long thereafter did the police arrive, if they did arrive?

A. The police and the other agents arrived shortly after—about five minutes after I had telephoned to the police, and almost immediately after I fired the shot out the window.

Q. Who came in first, the police officers?

A. Yes, sir.

(Testimony of George H. White.)

Q. Were there more than one? A. Two.

Q. Shortly thereafter which agents came into the room? A. Agents Grady and Bertin.

Q. Now, anything else said with the defendants at that time? Do you remember of any other conversation?

A. There was some conversation. Search was made of Leeper's room and no other narcotics were found. Various questions were [66] asked of the three persons, Leeper, Ballard and Ingoglia, by the police officers, as to their names and their addresses, and they then transported Leeper, Ingoglia and Ballard to the Oakland city police station and booked them.

Q. Now, when you looked into the package what did you see in the package? Now, by the package, I am referring to this grocery bag, as we will call it, U. S. Exhibit No.—what is it, 16?

The Clerk: 18, sir.

Q. (By Mr. Karesh): 18.

A. I saw a number, an uncounted number of white envelopes which are similar to the envelopes in which the drugs are now contained.

Q. Now, tell me, did you handle with your hands the envelopes inside the package? A. No, sir.

Q. What did you do with the package and the envelopes in the package?

A. I kept them in my immediate possession until I returned to San Francisco, and then gave the package to Agent Cass.

(Testimony of George H. White.)

Q. Now, did you put your initials on the envelopes that you had given to Agent Cass?

A. Not at that time.

Q. When did you do that?

A. The next morning. [67]

Q. All right. You have got the envelopes? What are these exhibits?

The Clerk: 20 to 31, inclusive.

Q. (By Mr. Karesh): Now, I will show you Exhibits 20 to 31, inclusive, for identification, and ask you can you identify them.

A. On each of these exhibits I put my initials, "G. H. W." in green ink, and these are the envelopes that were originally contained in the paper sack which I took from Leeper in the Room 306 of the Clay-Ten Hotel on October 31.

Q. 1948. Now, when did you see Cass and put your initials on these? Was that November 1st?

A. I put my initials on about nine o'clock in the morning on November 1st.

Q. Did you wear gloves when you did that?

A. Yes, sir.

Q. Your initials on each one of these?

A. Yes, sir.

Q. Were you present when the envelopes were broken open? A. Yes, sir.

Q. All right, tell us just what happened. Who was there?

A. Agent Grady, Agent Cass, and myself were present. Agent Cass, wearing rubber gloves, using

(Testimony of George H. White.)

a scissors, slit one end of the envelope and removed therefrom a cellophane package, opened that cellophane package by cutting it with a scissors, transferred the contents of the package into another waxed paper [68] package, and in turn put that waxed paper package inside of a different white envelope, weighed it and sealed it. The second package to which this powder had been transferred were then initialed by Cass, Grady and myself.

Q. Now, these packages you are talking about where the narcotics were replaced by Cass, U. S. Exhibits 1 to 12, were they examined to see if those are the envelopes, and you put your initials on those packages?

A. All of these packages bear my initials, and these are the packages to which the contents of the other envelopes were transferred on that occasion.

Q. When you say contents, was it a powder?

A. A powder.

Q. Now, what is there on the inside of the envelope, is there a cellophane—

A. There is a waxed paper contained inside of the white envelope.

Q. Inside of each one of these white envelopes?

A. Yes, sir.

Q. Now, Exhibits 20 to 31, inclusive, at the time you placed your initials on them, what color were they? A. They were white.

Q. All of the same size? A. Yes, sir.

(Testimony of George H. White.)

Q. Length and width?

A. Yes, sir. [69]

Q. All sealed?

A. Yes, sir. At the time I placed my initials on them they were not sealed.

Q. They were already broken?

A. They were open.

Q. What was the color, white? A. Yes.

Q. Inside of these was there just the powder, or some other wrapper inside of Exhibits 20 to 31?

A. Glassine envelopes contained inside the white envelopes.

Q. Look in U. S. Exhibit No. 18 For Identification and tell me—what do you call that?

A. I would call them paraffine or cellophane.

Q. How many are there, twelve?

A. Yes, sir.

Q. All right. Let me get this straight: Out of this paper bag came the 12 packages, U. S. Exhibits 20 through 31 For Identification?

A. Yes, sir.

Q. Out of these envelopes came the glassine bags and in the glassine bags came the powder?

A. Yes, sir.

Q. The powder was then taken out and transferred to waxed paper—the contents of one envelope here put in one envelope here, is that right? [70]

A. Yes, sir.

Q. Calling your attention to November 1, 1948, did you have a conversation with James Marvin Ballard? A. Yes, sir.

(Testimony of George H. White.)

Q. Where did the conversation take place and who was present?

A. It took place in the afternoon in the County Jail following arrangements before the United States Commissioner. Present were myself, Ballard, Agents Bertin and McGuire.

Q. May I digress for just a moment and ask you whether or not at any time you saw any revenue stamps on these packages to which we have referred, either this paper sack, U. S. Exhibit 18 For Identification, or these other envelopes, U. S. Exhibits 20 through 31 For Identification?

A. No, sir.

Q. Are any revenue stamps on this—would you call it again? A. Glassine envelopes.

Q. —glassine envelopes, U. S. Exhibit 19 For Identification?

A. At no time did I see any revenue stamps on any of those objects.

Q. And there are none here, of course, on U. S. Exhibit 1 through 20? A. No, sir.

Q. Now, going back to November 1, 1948, you say you had a conversation with Mr. Ballard—and may I say this, your Honor, this conversation is now offered, inasmuch as the conspiracy [71] is terminated at this time, only as to the defendant Ballard.

The Court: It is received only as to the defendant Ballard.

A. I asked Ballard if he cared to make any ex-

(Testimony of George H. White.)

planation of the situation in which he found himself. Ballard asked me what there was in it for him if he would make a statement. I told him that I was not empowered to make him any promises, but if he did make a statement and disclosed any information of value I would report that to the United States Attorney for whatever disposition he might be able to make of it. Ballard repeatedly asked me if I could assure him that he would not be prosecuted or indicted, and I told him that I could give him no such assurance. Ballard said that he first met Ingoglia through McDonough, that McDonough had met Ingoglia at the race track and had learned that Ingoglia had large quantities of narcotics; that he wished to see——

Mr. Dunning: Just a moment, I am going to object to this as hearsay as to the defendant Ingoglia.

The Court: I received it solely as to the defendant Ballard. It is not received against any other defendants.

A. Ballard said he had known Leeper for several years and he believed Leeper to have money, that he was a gambler, and he thought he might know some underworld characters who would purchase these narcotics.

Q. (By Mr. Karesh): That Leeper——

A. That Leeper would know some underworld characters who would [72] purchase these narcotics, and that he then made arrangements to introduce Leeper to McDonough, and McDonough introduced

(Testimony of George H. White.)

Leeper to Ingoglia. He said that on October 31st, the Sunday on which he was arrested——

Q. 1948?

A. ——1948, he had been in Leeper's room and that Leeper had told him to go out and get Ingoglia and bring him up to the room.

Q. Did he tell you what kind of a conveyance he was to use?

A. He said that he was driving Leeper's 1942 Cadillac automobile—1941 Cadillac.

Q. 1941.

A. I asked him if he knew what the purpose was in bringing Ingoglia to the room at that time and he said he did not. He said that he left the room, and in order to find Ingoglia he had to locate McDonough. He found McDonough and McDonough directed him to a location where he found Ingoglia standing on a street corner. He picked up Ingoglia and with McDonough he returned to the hotel. I asked him if he had seen Ingoglia carrying a package and he said that he had not. I asked him if he had seen McDonough carrying a package and he said that he had not. And I asked if he had carried a package and he said that he had not. I asked him if he knew that the reason for bringing Ingoglia to that hotel room at that time was to make a delivery of narcotics, and he said that he did not know that, that he figured something of the sort was going on. [73]

That was the extent of our conversation. I asked

(Testimony of George H. White.)

him if he had ever been arrested and he said he had not.

Q. Just a minute. Did you have any other conversation with Ingoglia? Ever talk to him?

A. No, sir.

Q. How about Leeper since the time in the hotel?

A. I talked to Leeper on the telephone on one occasion—I believe I was talking to Leeper at that time——

Mr. Deasy: I am going to object to this, may it please the court, the proper foundation has not been laid.

The Court: Yes.

Q. (By Mr. Karesh): When and where—what number did you call?

A. I called the Clay-Ten Hotel and asked for Leeper.

Q. When? How long after the arrest, if you remember?

A. Approximately two months thereafter.

Q. What did you say to him?

A. I said that I heard that he wanted to be in touch with me, that he wanted me to get in touch with him.

Q. What did he say?

A. But he said that he did, that he was very sick and he didn't feel that he could talk to me at that time.

Q. Talk with him since?

A. No, sir.

Q. Talk to McDonough?

(Testimony of George H. White.)

A. I have never talked to McDonough. [74]

Mr. Karesh: That is all. Pardon me, I see an agent in the room who might be a witness, Mr. McGuire, so I will ask him not to stay in the room. Apparently he didn't know that.

Cross-Examination

By Mr. Dunning:

Q. Referring to the date of October 31, 1948, you stated that upon that day, approximately 2:30 in the afternoon, that you went to the Clay-Ten Apartments with a person whom you know as Malla-bee, is that correct? A. Yes, sir.

Q. And at that time this individual was being used by you as an informer in this case?

A. Yes, sir.

Q. Is that the same Mr. Mallabee who was formerly convicted——

Mr. Karesh: Objected to as hearsay, he was convicted; objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. (By Mr. Dunning): Were you using this informer under any promise of immunity or reward of any kind at that time?

Mr. Karesh: Objected to as incompetent, irrelevant, and immaterial.

The Court: Sustained.

Q. (By Mr. Dunning): You proceeded from San Francisco, as I understand, with this informer, you went directly with Mallabee, the informer, to

(Testimony of George H. White.)

the Clay-Ten Apartments, is that correct?

A. Yes, sir. [75]

Q. And as I understand your testimony other agents followed you from San Francisco to the Clay-Ten Apartments?

A. Yes, sir.

Q. And did you alone, together with Mallabee, enter the Clay-Ten Apartments or did you go there with any other agents?

A. I entered alone with Mallabee.

Q. You entered the room—you are referring to room 306?

A. Yes, sir. [75a]

Q. And where were the other agents who followed you from San Francisco?

A. On the street outside.

Q. They did not enter the lobby or the premises of the Clay-Ten Apartments?

A. No, sir.

Q. And that was approximately 2:30 in the afternoon, is that correct?

A. No, it was later than that. We left San Francisco at about 2:30. It was about 3:30 when we entered the Clay-Ten.

Q. Now, did you go directly to the room with Mallibee or do I understand your testimony that he first went to 306, to where Leeper was present?

A. I don't know where he went, but he left me and went upstairs for about three minutes and then returned.

Q. How long was Mr. Mallibee gone?

A. About three minutes.

Q. About three minutes?

(Testimony of George H. White.)

A. Three or four minutes.

Q. And did he return directly to the lobby where you were? A. Yes, sir.

Q. And as I understand your testimony, Mr. White, you then proceeded to the room with Mr. Mallibee?

A. Proceeded to the room of Mr. Leeper.

Q. Of Mr. Leeper with Mr. Mallibee? [76]

A. Yes, sir.

Q. Now, was there—Withdraw that. Mr. Mallibee introduced you to Mr. Leeper and then he left immediately by saying that he guessed you didn't—he did not wait around any longer, is that correct?

A. That is correct.

Q. You had never met Leeper before?

A. No, sir.

Q. What name did Mr. Mallibee introduce you under to Mr. Leeper? A. Johnny Wilson.

Q. Now, no mention during your conversation with Mr. Leeper as to the defendant Ingoglia, was there? A. No, sir.

Q. How long did you say you talked to Mr. Leeper in the room, Mr. White?

A. About ten minutes.

Q. About ten minutes. And during that time you discussed the purchase of these narcotics that have been introduced in evidence, is that correct?

A. Yes, sir.

Q. Mr. Leeper didn't tell you where the narcotics were coming from?

(Testimony of George H. White.)

A. He said it came from New York.

Q. Now, as I understand your testimony, Mr. Leeper said to you that when these people arrived you were to go into the lavatory, [77] is that correct? A. Yes, sir.

Q. And that is the lavatory referred to inside of Room 306 at the Clay-Ten Apartments?

A. Yes, sir.

Q. Upon hearing the knock that you referred to, did you go immediately into the lavatory?

A. Yes, sir.

Q. Mr. Leeper was still in this room?

A. Yes, sir.

Q. He said to you that these people didn't want you to see them and he didn't want you to see them, is that correct? A. Yes, sir.

Q. Now, did you shut the door to the lavatory? Did Mr. Leeper shut the door? A. No, sir.

Q. Did Mr. Leeper go directly to the door?

A. Yes, sir.

Q. All that you know, Mr. White, is that Mr. Leeper placed his hand through the door and received an object? A. Yes, sir.

Q. You couldn't see on the other side or outside of the door of Room 306, could you?

A. No, sir.

Q. And you didn't see any object until after Mr. Leeper closed [78] the door and came back into the room—that is, he closed the door and approached you?

(Testimony of George H. White.)

A. I saw the object the minute he withdrew it into the room. I was watching him put his hand through the door.

Q. And he shut the door?

A. As he brought his hand back in, he was holding an object and he then shut the door.

Q. He then what?

A. He then shut the door.

Q. He then shut the door, and then Mr. Leeper went to you with the object or the package that has been referred to here, is that your testimony?

A. Yes, sir, he walked towards me and I walked towards him

Q. I see. And did Mr. Leeper then hand you this package that has been referred to?

A. Yes, sir.

Q. And the package was the same package that has been generally described here as being contained in a brown paper envelope, Plaintiff's Exhibit No. 18 for identification? A. Yes, sir.

Q. Is that correct? You couldn't see what was inside of the package, the white envelope, at the time Mr. Leeper approached you with the brown paper package, could you? A. No, sir.

Q. You then took the brown paper bag or package from Mr. Leeper, [79] is that correct?

A. Yes, sir.

Q. And I take it that you immediately examined the contents and counted them?

A. I didn't count them.

(Testimony of George H. White.)

Q. Well, there has been identified for identification twelve envelopes, is that correct?

A. Yes, sir.

Q. And did you notice that there were twelve envelopes in the brown paper bag or a number of envelopes in the brown paper bag?

A. A number, but I didn't count them at that time.

Q. You didn't count them, but you observed that there were a number of white envelopes in the paper bag?

A. Yes, sir.

Q. Is that correct? Now, did you make any examination of the white envelopes that you so observed?

A. At that time?

Q. Yes.

A. No, sir. [80]

Q. What did you do with this brown paper bag immediately after you received it from Mr. Leeper?

A. I kept it in my left hand.

Q. Did you have it in your left hand all of the time from the point of time of receiving it from Mr. Leeper to the point of time you opened the door of room 306?

A. Yes, sir.

Q. When you say you observed a number of envelopes in the brown paper bag, I take it you examined the contents of the bag in some respects; how did you do that, Mr. White?

A. By opening the bag and looking into it.

Q. And you could see from that observation that there were a number of white envelopes contained in the brown paper bag?

A. Yes, sir.

(Testimony of George H. White.)

Q. What, if anything, did you say to Mr. Leeper? What did he say to you and what did you say to him when he handed you the brown paper bag?

A. Leeper said, "Here is the stuff." I didn't say anything.

Q. What did you do next?

A. Opened the door of the hotel room.

Q. You went directly to the door of 306?

A. Yes, sir.

Q. Didn't you identify yourself to Mr. Leeper as a federal officer at that particular point of time after you observed the contents of this brown bag?

A. No, sir.

Q. Didn't you give certain instructions to Mr. Leeper as to what he should do immediately after you examined the contents of this brown bag?

A. No, sir.

Q. Didn't you tell Mr. Leeper to sit himself upon the floor of room 306?

A. Not at that time.

Q. You say you went directly to the door, is that correct?

A. Yes, sir.

Q. You drew your gun from your person, did you not, immediately after you observed the contents of the brown bag and when you proceeded to the door of room 306?

A. As I opened the door.

Q. As you opened the door. Well, didn't you

(Testimony of George H. White.)

observe anything that Mr. Leeper said or did when you drew your gun, Mr. White?

A. As far as I know, he was just standing there. He said nothing.

Q. He observed you take your gun and proceed to the door of room 306, is that correct?

A. Yes, sir.

Q. At that time you said nothing whatsoever to Mr. Leeper? A. No, sir.

Q. You gave him no instructions at all as far as sitting himself upon the floor of room 306? [82]

A. No, sir.

Q. When you drew your gun, as you have so testified, and proceeded to the door of room 306, had you at any time made any search of Mr. Leeper? A. No, sir.

Q. What observations, if any, did you take of Mr. Leeper's actions during all this time that you proceeded to the door with your gun drawn?

A. I tried to keep them under observation as best I could.

Q. When you say as best you could, how would you describe that?

A. I would describe that by saying I would look at him as much as I could consistent with the other thing that I was trying to do.

Q. Do you mean to say that you did look at Mr. Leeper while you had your gun drawn?

A. Yes, sir.

Q. He made no statement nor asked no questions of you under those circumstances?

(Testimony of George H. White.)

A. No, sir.

Q. You did not at that particular time or at any other time while you were inside the room tell Mr. Leeper that you were a federal officer?

A. Subsequently when I came back in the room with Ingoglia and Ballard.

Q. You did not during that period of time before you opened the [83] door of Room 306 with your gun drawn, you did not during that period of time state to Mr. Leeper that you were a federal officer?

A. No, sir.

Q. You did not during any of that period of time give him any instructions or orders as a federal officer? A. No, sir.

Q. Referring to Plaintiff's Exhibit 14 for identification, that generally is a photograph showing the approach of Room 306; is that correct?

A. The approach to Room 306.

Q. From the hallway? A. Yes, sir.

Q. Where with reference to that photograph is Room 306? Would you hold it up?

A. The Room 306 is immediately adjacent to this portion of the photograph here, and the edge of the door can just barely be seen. It appears as a slightly darker spot on the photograph.

Q. It is true, is it not, Mr. White, that there is a bend or an angular turn in the hallway toward Room 306, is that correct? A. Yes, sir.

Q. How much would you approximate the distance to be of the turn, from the turn to the door of 306?

(Testimony of George H. White.)

A. I believe that the hinged side of the door of 306 is directly against the hall itself. If not directly against it, not [84] more than six inches away from it.

Q. You are referring to what hall? Are you referring to this hallway that is disclosed in this photograph?

A. Yes, sir.

Q. But not the section of the hallway that we referred to as that portion which turns from the main hall?

A. The Room 306—I might better explain it by saying that at the end of the hallway there is a large recess that opens into a sort of Y at the end. On the 306 side, the hinges of the door of 306 are almost even with the corridor of the hotel, but the opposite side of the door would be several feet back of the corridor line; so there is about a 45 degree angle.

Q. Back of what we might refer to as the main corridor, is that correct?

A. Yes, sir.

Q. You say there is another corridor, a small corridor, that extends itself from the main corridor, from this portion of the photograph, is that correct (indicating)?

A. Yes, sir, it is recessed, I would call it.

Q. How far is that from Room 306?

A. How far is the end of that?

Q. How far is the beginning of that hallway from Room 306?

(Testimony of George H. White.)

A. Well, 306 enters onto that portion of the extended hallway.

Q. You then went to the door of Room 306, is that correct? A. Yes, sir. [85]

Q. Up until that point of time, you had made no observations as to who the person was on the other side of the Room 306? A. No, sir.

Q. You opened the door, did you?

A. Yes, sir.

Q. You had your gun drawn? A. Yes, sir.

Q. You then observed the defendant Ingoglia and the defendant Ballard, is that correct?

A. Yes, sir.

Q. As I understand your testimony, Mr. White, you then placed your gun upon the persons of both Ingoglia and the defendant Ballard and informed them that you were a federal officer?

A. I am not sure that I understand you.

Q. Immediately upon opening the door, you informed both of these defendants that you were a federal officer, is that correct? A. Yes, sir.

Q. The defendants, as I understand your testimony, retreated? A. Yes, sir.

Q. A distance of some three or more feet from where they were first standing when you opened the door? A. Yes, sir.

Q. You would say, would you not, that they retreated at that time to a distance of some four or five feet from Room 306? [86] A. Yes, sir.

Q. And during this period of time you had your

(Testimony of George H. White.)

gun on both the defendant Ingoglia and the defendant Ballard?

A. I was holding it in my hand. I did not place it on them.

Q. Yes, you were holding it in your hand so they could see it? A. Yes, sir.

Q. What question did you say you asked or statement you made to either of those defendants at that particular point of time?

A. I told them to get in the room.

Q. Was that all that you said to either of the defendants?

A. In addition to telling them that I was a narcotic agent.

Q. You told them that after you had retreated, as you have so testified, is that correct?

A. Yes, sir.

Q. During all of this time that you had held your gun and the defendant Ingoglia and Ballard retreated from their position in the hallway there, where was the defendant Leeper?

A. In his room.

Q. He was still in his room, and you did not have the defendant Leeper under observation?

A. No, sir.

Q. Leeper was not on the floor?

A. No, sir.

Q. You did not at any time search Mr. Leeper from the time you received the package from him to the point of time where you [87] observed the defendant Ballard and Ingoglia?

(Testimony of George H. White.)

A. That is correct.

Q. You say you observed the lavatory in the hallway there? A. Yes, sir.

Q. Did the defendants Ingoglia and Ballard retreat as far as the lavatory? A. No, sir.

Q. Well, they retreated far enough so that you could see all the way down the main corridor, is that correct? A. Yes.

Q. When you first opened the door, which one of the defendants did you first observe?

A. I saw them both simultaneously.

Q. Were they standing side by side or one in front of the other or exactly how were they standing? A. Side by side.

Q. Mr. White, you had already advised the defendants that you were a federal officer and they entered the room, is that correct, under your direction? A. Yes, sir.

Q. You asked the defendant Ballard what his name was and he told you James Ballard?

A. Yes, sir.

Q. And you asked the defendant Ingoglia what his name was, is that correct? [88]

A. Yes, sir.

Q. You testified he said his name was Andy Bruno, is that your testimony? A. Yes, sir.

Q. Do you recall that he said Andy or Bruno?

A. No, sir.

Q. And that you then asked him for his last name and he stated his name was Ingoglia?

A. That is not correct.

(Testimony of George H. White.)

Q. That is not correct; that is your testimony?

A. No, it is not.

Q. Isn't it a fact that immediately upon bringing the defendant Ingoglia along with Ballard into the room, that you then ordered both of these defendants to remain seated upon the floor of Room 306?

A. No, I searched them first.

Q. You searched Ballard and you searched Ingoglia?

A. And Leeper.

Q. And then you searched Leeper?

A. Yes, sir.

Q. You then phoned the clerk of the hotel, as I understand it, is that correct?

A. Yes, sir.

Q. None of the other agents appeared upon the scene at that particular point of time? [89]

A. No, sir.

Q. They still remained outside the Clay-Ten Apartments, as far as you know?

A. Yes, sir.

Q. It was some time, was it not, Mr. White, before any police officers or agents appeared at Room 306?

A. About five minutes.

Q. After you had waited for some period of time, you found it necessary to fire several shots out of the apartment window in order to attract the other agents who were outside the Clay-Ten Apartments?

A. One shot.

Q. How long after you fired that one shot did the other agents appear?

A. Within about a minute.

Q. Your main interest at the time you opened

(Testimony of George H. White.)

the door and saw the defendants Ballard and Ingoglia was upon those two persons, is that correct?

A. Was what?

Q. Your main interest at that point of time was centered upon those two individuals?

A. Well, I was interested in everything that was going on and everyone that was present.

Q. You did not make a search of the lavatory that was adjoining the hallway there, did you? [90]

A. No, sir.

Q. There is a door to the lavatory, is there not?

A. Yes, sir.

Q. You had no further conversation with the defendant Ingoglia inside of the Room 306 after you directed him to enter it together with Ballard, did you? A. Yes, I did.

Q. Well, he gave you his name, as I understand it, is that correct? A. Yes, sir.

Q. And he told you that he was in the hallway where you found him. There was no other conversation?

A. He said he was waiting for a fellow.

Q. You had the package that you referred to that has been introduced here in your hand all the time, Mr. White, from the time you received it from the defendant Leeper? A. Yes, sir.

Q. Was this package as I see it here, discolored? This was, I take it, submitted for fingerprints?

A. Yes, sir.

Q. And all of the other exhibits, the envelopes

(Testimony of George H. White.)

introduced for identification, were likewise submitted for fingerprints of these defendants?

A. Yes, sir.

Q. You say you asked the defendant Ballard if the defendant [91] Ingoglia had this package at the time he first observed him on this day?

A. Yes, sir.

Q. He told you that Ingoglia did not have any package upon his person?

A. He said he did not see any.

Q. He did not see any package and he did not see any package on Ingoglia from the time he first met him on the day in question or during any of the time from the time he met him until the time you first observed the defendants in the hallway?

A. He had never seen the package at all until I showed it to him, under any circumstances.

Q. He never saw the package at all. Ballard did not tell you he met Ingoglia for the purpose of the delivery of this particular package, did he?

A. No, sir.

Q. Or for the purpose of delivering any narcotics?

A. No, sir, he said that he had thought that he might have been delivering narcotics.

Mr. Dunning: I will ask that that go out.

The Court: It is further conversation.

Mr. Dunning: He said he thought.

The Witness: He said he thought it might have been for that purpose, but he did not see any package.

(Testimony of George H. White.)

Q. (By Mr. Dunning): He did not tell you he knew of any transaction [92] that was actually taking place at that point of time, did he?

A. No, sir.

Q. Mr. White, as I understand it, when you heard him knock on the door, you walked from the position where you were in 306 talking to the defendant Leeper to the lavatory in the apartment, is that correct? A. Yes, sir.

Q. And you remained there until the defendant Leeper went to the door and opened it, is that correct? A. Yes, sir.

Q. You saw no person standing outside the door? A. No, sir.

Q. Leeper then closed the door and walked towards you from your position in the lavatory, is that correct?

A. No, sir, I was no longer in the lavatory when he opened the door and left the lavatory.

Q. You started to walk out of the lavatory and Leeper then handed you the package?

A. Yes, sir.

Q. And you opened the package?

A. Yes, sir.

Q. You made an observation to such an extent as you did observe of a number of white envelopes in the package, is that correct? A. Yes, sir.

Q. Then you took your gun from your person and proceeded to the door of Room 306?

A. Yes, sir.

(Testimony of George H. White.).

Q. And then you opened the door?

A. Yes, sir.

Q. And your testimony is that during all that period of time that only five seconds elapsed?

A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Mr. Dunning: I have no further questions.

Cross-Examination

By Mr. Deasy:

Q. Mr. White, referring to the conversations that you had with Mr. Ballard, you had certain conversations on October 31, 1948 and certain on November 1, 1948, is that correct?

A. Yes, sir.

Q. And those are the two statements that you were referring to in your testimony on the witness stand here? A. Yes, sir.

Q. Now, have you any notes that you made of those conversations? A. No, sir.

Q. Then you are testifying now strictly from your memory of what took place on those two occasions, is that correct? I am [94] referring now to conversations. A. Yes, sir.

Q. You stated that you have been employed as a narcotic agent for some 16 years, is that correct, Mr. White? A. Yes, sir.

Q. How much of that time has been spent in the Bay Area?

A. Well, I first came here in 1934, worked here for one year, 1934 to 1935, and did not return here

(Testimony of George H. White.)

except for brief special assignments until September of last year.

Q. September of last year, is that correct?

A. Yes, sir.

Q. How long have you been the supervising narcotic officer for this district?

A. Since I came here in September of last year.

Q. September of 1948? A. Yes, sir.

Q. Now, if I recall your testimony, this is the first time that you have seen Mr. Leeper, is that correct, when you saw him in the Clay-Ten Hotel?

A. Yes, sir.

Q. From the time that you and Mr. Mallibee first entered the room at Room 306 at the Clay-Ten Hotel until the time that you heard the knock on the door, did you hear any other sounds out in the hallway? A. No, sir. [95]

Q. Then you did not hear any footsteps approaching, did you, sir? A. No, sir.

Q. Mr. Mallibee had previously been in the room and he left, didn't he? A. Yes, sir.

Q. Was that hallway carpeted?

A. I believe so.

Q. In any event, whether it was carpeted or not carpeted, the first sound that attracted your attention from the outside after you first arrived was the knock on the door? A. Yes, sir.

Q. You were accompanied, sir, to Oakland by certain agents, is that correct? A. Yes, sir.

Q. And who were those agents?

(Testimony of George H. White.)

A. Agents Grady, Cass and Coffill.

Q. And those gentlemen are agents in your department working under your supervision and control?

A. Yes, sir.

Q. However, there was also another party who was working for you at that time whom you classify as an informer?

A. Yes, sir.

Q. So the status of Mr. Mallibee on this particular day was not an employee in the same sense as the other agents, is that correct? [96]

A. That is correct.

Q. Was he being reimbursed for his work?

A. No, sir.

Q. He was not getting any pay?

A. No, sir.

Q. And when I say pay I mean money.

A. I understand you.

Q. Was he receiving any reward of any description?

Mr. Karesh: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Deasy): After you were in with Mr. Leeper for a period of time, you heard a knock on the door, is that correct?

A. Yes, sir.

Q. Mr. Leeper handed you a package?

A. Yes, sir.

Q. You had in your possession some \$10,000?

A. Yes, sir.

Q. And this \$10,000, or whatever portion was

(Testimony of George H. White.)

necessary, was to be used to pay for the contents of this package? A. Yes, sir.

Q. After you were handed the package and looked into it, you started over toward the door of Room 306? A. Yes, sir.

Q. You had not at that time identified yourself as an agent, had [97] you? A. No, sir.

Q. And the price I understood you were to pay was something like \$900 an ounce, is that correct?

A. Yes, sir.

Q. And subsequent weighing proved there were approximately 11 ounces?

A. 12 packages containing 11 ounces.

Q. So the price would be somewhere in the vicinity of \$10,000? A. Yes, sir.

Q. When you started walking out toward the door, you had the narcotics and the \$10,000 both; that is correct, isn't it? A. No, sir.

Q. What had you done with the \$10,000?

A. I had hidden it in the radio at Mr. Leeper's suggestion.

Q. You had hidden it in a radio, is that correct?

A. Yes, sir.

Q. And then when you walked toward the door with these narcotics Mr. Leeper was left in the room with \$10,000, with the money hidden, is that correct? A. Yes, sir.

Q. At that time you did not tell him to get down on the floor, did you? A. No, sir.

Q. You did not introduce yourself as a federal

(Testimony of George H. White.)

agent at all [98] at that time? A. No, sir.

Q. Now, I am going to call your attention to United States Exhibit No. 16. Is that an exact representation of that scene as you viewed it on the 31st day of October 1948?

A. I would say so, with the exception that it was lighter than this photograph appears to be.

Q. It was brighter than the photograph appears to be, is that correct? A. Yes, sir.

Q. When was it that you first noticed the room that is depicted in Government's Exhibit No. 16?

A. When I opened the door.

Q. After being in the room with Mr. Leeper?

A. When I emerged from the room and apprehended McDonough and Ingoglia.

Q. Well, you did not apprehend McDonough and Ingoglia, as a matter of fact.

A. I am sorry.

Q. You apprehended Ballard and Ingoglia, is that correct? A. That is right.

Q. Then, as you went into the room, you did not notice that room as depicted there, with the open door there, at all, did you? A. No, sir.

Q. So you could not tell at that time whether that door was open [99] or closed at all, did you?

A. No, sir.

Q. So you could not tell at that time whether that door was open or closed when you went into the room, could you? A. No, I could not.

Q. Were the doors of any other rooms open on

(Testimony of George H. White.)

October 31, 1948, either in the small alleyway that is depicted in United States Exhibit No. 16 or in the long corridor when you come down from the elevator, if you now recall?

A. None that I recall.

Q. At the time that you were in the room with Mr. Leeper, did you notice that he was lame?

A. Yes, sir.

Q. When you saw him walk over to the door, did you notice he was lame? A. Yes, sir.

Q. Did you notice whether or not he had a cane?

A. Yes, sir.

Q. And when was it that you first noticed the cane? A. When I first met him.

Q. Did he have the cane in his hand when he was going around the room or was it parked some place in the room?

A. I believe he carried it all the while.

Q. When you were out in the hallway with your gun on Mr. Ingoglia and Mr. Ballard, could you see Mr. Leeper? [100]

A. Not all the time. I could see him a portion of the time.

Q. There was a period of time when you could not see him, is that correct?

A. When I was looking forward at Ingoglia and Ballard, I could not see Leeper. He was back of me.

Q. And as they were retreating away from you, you kept looking at that, isn't that correct?

(Testimony of George H. White.)

A. Yes, sir.

Q. At that time Mr. Leeper was alone in the room out of your sight with \$10,000 of the Government's money?

A. That is correct.

Q. In addition to that, Mr. Leeper was behind you in the room with a cane in his possession—after you had announced just previously that you were a federal agent, isn't that correct?

A. That is correct.

Q. Now, I am referring to Mr. Ballard, Mr. White, to your conversations with him, and I am referring particularly to the conversation as of October 31, 1948, is that right? You understand what I am talking about?

A. I do.

Q. And in that conversation he told you that he had seen no package, is that correct?

A. That is right.

Q. You asked him what his name was and he told you that his name was James Ballard, correct?

A. Yes, sir.

Q. You asked him what his business or occupation was; he told you that he drove a taxicab, is that correct?

A. Yes, sir.

Q. You asked him why he was coming up to see Mr. Leeper and he told you that he was coming to see Mr. Leeper to see if Mr. Leeper could obtain him a job, or words to that effect, isn't that right?

A. A job in the railroad.

Q. And that substantially was the entire conversation that took place on the 31st of October,

(Testimony of George H. White.)

1948, with Mr. Ballard, as you now recall?

A. Yes, sir.

Q. Now, I am referring to the next conversation, which I believe you said was November 1st of 1948, am I correct in that? A. Yes, sir.

Q. Approximately what time was that, please, Mr. White?

A. About 3:00 o'clock in the afternoon, I believe.

Q. And in that conversation he told you that he had met Mr. Ingoglia about two days before, is that correct? A. Several days before.

Q. And he said that he was requested to go and get Mr. Ingoglia, is that correct? In that conversation he said that, did he not?

A. Referring to the occasion of the 31st?

Q. Yes, sir. [102] A. Yes, sir.

Q. I am referring to the conversation of November 1st as it refers to the occasion of October 31st. Do we have a meeting of the minds?

A. That is correct.

Q. And he told you he did not know where Ingoglia was, isn't that right? A. Yes, sir.

Q. He told you that he had to get some assistance to find out where the man was, isn't that right?

A. Yes, sir.

Q. And he said he did not know what Leeper wanted with Ingoglia or he did not know what Ingoglia wanted with Leeper, isn't that correct?

(Testimony of George H. White.)

A. No, sir.

Q. What was it he said about that?

A. He said he thought it had to do with a narcotics transaction.

Q. I realize he told you that later, but didn't he tell you first, sir, that he did not know what Leeper wanted with Ingoglia? A. No.

Q. But that he thought he wanted him in connection with some narcotic deal?

A. That is correct.

Q. Then he did tell you first that he did not know; he merely [103] surmised or thought, is that correct? A. That is correct.

Q. And he said that he picked Mr. Ingoglia up, brought him to the hotel, and saw no damage?

A. That is correct.

Q. Just one second, Your Honor, and I will be through. This conversation of November 1st, 1948—was that conducted in question and answer form? A. Yes, sir.

Q. You would ask certain questions and the defendant would give you certain answers to them, is that right?

A. Not in a form that you and I—that you are asking me questions at the moment. I made a general question and he would make a general answer.

Q. All right. Can you give me an example of a general question, please?

A. Yes. I said I wanted to know if he was will-

(Testimony of George H. White.)

ing to make an explanation of the circumstances surrounding his arrest. He countered with an answer in which he said in effect, "What is there in it for me?"

Q. You told him that you could make him no promises? A. That is correct.

Q. But you told him that if he would talk to you and there was anything that was beneficial to you, in such an event you would take it up with Mr. Karesh, this gentleman here, isn't that [104] correct? A. That is correct.

Mr. Deasy: I think that is all, sir. Thank you very much.

Mr. Dunning: No further questions. May I suggest we recess at this time?

The Court: I was going on to half-past four.

Mr. Dunning: I see. I had another appointment.

Redirect Examination

By Mr. Karesh:

Q. Mr. White, do you recall how the defendant Leeper was dressed in the hotel room on October 1, 1948?

A. He was wearing a shirt and trousers.

Q. Did he have on a coat? A. No, sir.

Q. Any bulges in his pocket? A. No, sir.

Q. When the knock was on the door, you heard the knock at the door, where were you?

A. I was seated in a chair about three feet from the bathroom door.

(Testimony of George H. White.)

Q. Did you have Mr. Leeper under your surveillance at that time?

A. Yes, he was seated on the bed directly opposite me.

Q. I am speaking of the time there was a knock on the door and he went to the door; did you have him under your surveillance? A. Yes, sir.

Q. After the knock on the door, he turned around, he opened the [105] door, and stuck his hand through the door—did you see that?

A. Yes, sir.

Q. You saw him bring back a package?

A. Yes, sir.

The Court: You have gone into all this, Mr. Karesh.

Q. (By Mr. Karesh): Did you hear any sound from the time there was the knock on the door until Mr. Leeper brought his hand back in the door?

A. No, sir.

Q. Or at the time you immediately opened the door—any sounds?

A. I heard myself talking.

Q. Beside that?

A. No, sir—I am not sure I know what you mean.

Q. Did you hear any footsteps in the hall?

A. No, sir.

Q. How does the door open in Room 306? Does it swing outward? A. It swings inward.

Q. Did you ask the defendant Leeper and/or

(Testimony of George H. White.)

the defendant Ballard when they came up whether they had seen anyone in the hall?

A. Yes, sir.

Q. What did they say?

A. That they had seen no one. That was Leeper and Ingoglia.

Q. That is what I meant.

A. I am sorry. Ballard and Ingoglia. [106]

Q. Ballard and Ingoglia said they had seen no one. That is all.

Recross-Examination

By Mr. Dunning:

Q. Mr. White, did you suspect that there was someone else in the hallway at that time when you asked Ballard and Ingoglia that question?

A. I do not know.

Q. You had an idea in your mind that there might have been?

A. No, they said they had not put the package in themselves. Yet the package did come in. And so I asked them if they had seen someone else put it in there, and they said they had not.

Q. Did you ask them if they saw someone else put the package in or had they seen someone else in the hall? Which one of those two questions did you ask?

A. I asked them if they had seen anybody else in the hall and they said they had not.

Q. So you did not ask them, then, whether they saw someone else put a package through the door?

A. You are correct.

(Testimony of George H. White.)

Q. You were wrong in that respect before?

A. I was wrong, yes, sir.

Q. (By Mr. Karesh): You asked them whether they had seen the package? A. Yes, sir.

The Court: Any further recross from counsel for the defense? [107]

(No attorney for the defendants indicate a desire to further question the witness.)

Mr. Karesh: And that is all. We have a short witness from the Department of Motor Vehicles whom we would like to call.

The Court: Bring him in.

LESTER HINGSBERGEN

was called as a witness on behalf of the Government, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Karesh:

Q. What did you say your name is?

A. Hingsbergen.

Q. What is your full name? A. Lester.

Q. By whom are you employed?

A. By the State Department of Motor Vehicles.

Q. You brought certain records here in response to subpoena duces tecum with reference to an automobile? A. That is right.

Q. With reference to 1948 license plates for an automobile; do you have the original and a photostat of it?

A. We have the original records from our files.

(Testimony of Lester Hingsbergen.)

Q. I do not want to go back any further than——

A. 1947.

Q. 1947, with 1948 marked thereon, is that correct? [108]

A. That is right.

Q. What have you in your hand there?

A. I have the registration certificate dated March 31, 1948, with license number 17K120, tab number 1682357 in the name of Leonard F. Leeper.

Q. Read the whole card, everything that is on it.

A. The address is 1014 Clay Street, Oakland; Cadillac Eight automobile; date first sold 7/10/41; date issued 11/26/47; motor number is 5363157; body type five-passenger coupe; year model 1940; model of the car was a 4161; legal owner is the Seaboard Finance Company at 14th and Webster Streets, Oakland, California; and fees paid for 1948, \$17, with penalties \$33.

Q. The registered owner is——

A. Registered owner is Leon F. Leeper.

Q. Leonard F. or Leon?

A. Leonard F. I beg your pardon.

Q. I notice it is a 1947 registration card and yet you say this is a registration for 1948.

A. Yes.

Q. How do you explain that?

A. Well, when they come for the 1947 registration certificate, when they come to our office, they present this to be paid and the 1948 tab is issued on the certificate.

Q. And then you stamp "March 31, 1948"?

(Testimony of Lester Hingsbergen.)

A. That is our stamp for our accounting department; the 1948 [109] certificate is mailed to the registered owner.

Q. So this is the license for 1948?

A. That is right.

Q. You have the photostat there?

A. I have the photostat.

Q. Certified? A. Certified, yes.

Mr. Karesh: I will ask this registration card, Your Honor, be marked for identification next in order. Counsel stipulated that we may offer a photostat instead of the original registration card.

The Court: Very well.

(The photostat of the registration card referred to was thereupon marked United States Exhibit No. 32 for identification.)

Mr. Karesh: That is all. Any questions?

(No counsel for the defendants indicated a desire to question the witness.)

Mr. Karesh: We have one more short witness, the gentleman from the hotel.

OTTO NIELSEN

was called as a witness on behalf of the United States, and being first duly sworn, testified as follows:

The Clerk: Your name is Mr. Nielsen?

A. Yes, sir. [110]

Q. Where do you reside?

A. Hotel Clay-Ten.

Q. Is that in Oakland? A. Oakland.

(Testimony of Otto Nielsen.)

Q. Tenth and Clay Streets in Oakland?

A. That is right.

Q. The hotel faces Clay Street? A. Yes.

Q. Between 10th and 11th, the corner of 10th, and then it is between 10th and 11th; that is right, isn't it? A. That is right.

Q. How many rooms in that hotel? A. 90.

Q. Is there a Room 306 in the hotel?

A. Yes, sir.

Q. Is that on the third floor?

A. Third floor.

Q. Is it far down the corridor from the elevator? A. It is at the corner.

Q. At the other end of the elevator?

A. Yes, sir.

Q. Have you a record of registration for Room 306? Did you bring it here in response to our subpoena? A. Not for 306. For 403.

Q. Did you have a record for 403? [111]

A. Yes.

Q. Who lived in 403 on June 4, 1945?

A. Ray Leeper.

Q. And then when did Mr. Leeper move into another room in the hotel, if he did?

A. He moved into several rooms before he moved into Room 306.

Q. When did he move into Room 306? You have certain records, have you not? A. Yes.

Q. Would you say he was in Room 306 as of August, 1948? A. Yes. [112]

(Testimony of Otto Nielsen.)

Q. You are certain of that? A. Yes, sir.

Q. September, 1948? A. Yes.

Q. And October, 1948? A. Yes, sir.

Q. You were not able to find the registration card, were you? We looked, is that right?

A. Right.

Q. At the hotel you keep a record of phone calls made outside? A. Yes, sir.

Q. Do you have the record of phone calls for the month of October in your book?

A. Yes, I have.

Q. You put those phone calls on a slip of paper?

A. I copied them off from October 1st to November 1st.

Q. 1948? A. 1948.

Q. You did that at my request, is that right?

A. Yes, that is right.

Q. And you put it on the slip of paper, these phone numbers? A. That is right.

Q. These calls were all made from Room 306 from October 1, 1948, to November 1, 1948, is that correct? A. Yes, sir. [113]

Q. You have a notation there October 20, 1948, a call was made to what number from Room 306?

A. Lo-9-5281.

Q. What is that? A. Lo-9-5281.

Q. What does "Lo" mean?

A. Lochhaven, I think.

Q. Lochhaven 9-5281, and there are other telephone calls on this slip of paper? A. Yes.

Q. In other words, there is a record kept of

(Testimony of Otto Nielsen.)

every call sent out from the rooms, is that right?

A. That is right.

Q. Each room does not have a phone of its own, does it? A. Yes, sir.

Q. By that I mean it does not have an independent number of its own; it all goes through the central switchboard of the hotel?

A. That is right.

Q. That is, in the case of Room 306, the phone is connected to the switchboard and all the calls go through that switchboard? A. Yes.

Q. And a record of those phone calls is kept in this book? A. Right. [114]

Q. You brought the book, from that book you copied those entries on that slip of paper from October 1, 1948, to November 1, 1948?

A. That is right.

Q. From Raymond Leeper's room?

A. Yes.

Q. He is charged with those phone calls, is that correct? A. That is right.

Mr. Karesh: We will ask that this slip of paper be marked for identification.

(The paper referred to was thereupon marked U. S. Exhibit 33 for Identification.)

Q. Mr. Nielsen, on the third floor you measured at our request the length of the hall from the elevator down to Room 306? A. 68 feet.

Q. Are you sure it is 68?

A. That is from the elevator.

Q. How far from the end of the hall?

(Testimony of Otto Nielsen.)

A. 73.

Q. Room 306—that veers off from the hallway, does it not? A. Yes, sir.

Q. Did you measure the distance from the hallway to the door, itself?

A. It is about three feet. [115]

Q. Is that from the hinge side or the knob side?

A. That is on the short side.

Q. That is the hinge side?

A. I don't know what the other side would be.

Q. You mean on the hinge side you do not know how long it would be, but how much is the knob side?

A. Three feet. The other would be about two feet long.

Q. Tell me, have you ever ridden in a car with Mr. Leeper? A. Yes, sir.

Q. What kind of car was it?

A. It was a Cadillac, a maroon-colored Cadillac.

Q. How many times?

A. I rode in it once.

Q. He took you in the car and drove it?

A. Yes.

Q. Did he have the keys?

A. I think so, yes.

Q. Tell me, did Mr. Leonard Leeper ever live at the Clay-Ten Hotel? A. No.

Q. I notice there is a registration certificate that says Leonard F. Leeper, 1014 Clay Street, Oakland, California. He never lived at the Clay-Ten Hotel, did he?

(Testimony of Otto Nielsen.)

A. No, Raymond Leeper was the only one who ever lived there.

Mr. Karesh: That is all with this witness. [116]

Mr. Dunning: I have no questions.

Cross-Examination

By Mr. Deasy:

Q. Mr. Nielsen, calling your attention to Government's Exhibit No. 33, this, as I understand it, contains all of the phone calls made from Room 306 between October 1, 1948, to and including November 1, 1948, is that correct?

A. That is right.

Q. And every phone call, both local and long distance, are made through your switchboard, is that correct?

A. Yes, sir.

Q. And every phone call that is made through your switchboard is recorded, is that correct?

A. Yes, sir.

Q. Now, have you the original record of the telephone for October 31, 1948?

A. Yes.

Q. May I see it for one second, please?

A. The 31st would start here. I think it is on this next page (producing document).

Q. Were you, yourself, on duty on October 31, 1948?

A. No, sir, I don't work behind the desk, only about an hour a day at noon time.

Q. I am going to call your attention to this record of October 31, 1948, and ask you if there is any telephone calls which originated in Room 306, according to this record, please?

(Testimony of Otto Nielsen.)

A. On the 31st? [117]

Q. Yes, please.

A. No, sir, I don't have any on the 31st.

Q. I am going to ask you particularly about October 31, 1948, if there was a telephone call to Templebar 2-3600 originating from Room 306.

A. That was called from the office downstairs, not from 306.

Q. That wouldn't be called from 306?

A. It wasn't called from 306. It is checked right here.

Mr. Deasy: That is fine. That is all.

Redirect Examination

By Mr. Karesh:

Q. What is that you said?

A. It was called from the office downstairs.

Q. There was a call sent——

A. It was called from the office downstairs, not 306.

Q. Templebar 2-3600?

A. Templebar 2-3600.

Q. Came in from the police department, not someone downstairs calling and asking you to call the——

A. No, Bertin wouldn't charge a call——

Q. He wouldn't charge a police call to 306, would he? A. No, sir, he would not.

Q. And therefore it wouldn't appear as coming from 306? A. No.

Q. You have the number Templebar 2-3600?

A. That is right. [118]

(Testimony of Otto Nielsen.)

Q. That is the police department's number?

A. Yes, sir.

Recross-Examination

By Mr. Deasy:

Q. Will you look at 717 on that date and see if there is any call?

A. That is the office call.

Q. 717? A. The office phone.

Q. Is the office phone, is that correct?

A. Yes.

Q. And you have how many calls from 717 to Templebar 2-3600? Two of them.

Mr. Deasy: That is all.

(Thereupon an adjournment was taken until tomorrow, Wednesday, June 8, 1949, at 10 o'clock a.m.) [119]

Wednesday, June 8, 1949

WILLIAM H. GRADY

called as a witness on behalf of the Government and having been first duly sworn testified as follows:

The Clerk: What is your full name?

A. William H. Grady.

Direct Examination

By Mr. Karesh:

Q. Mr. Grady, you are a special agent of the Bureau of Narcotics of the United States of America? A. Yes, sir.

Q. How long have you been an agent?

(Testimony of William H. Grady.)

A. Approximately seven years.

Q. You are assigned to the San Francisco office?

A. Yes, sir.

Q. Mr. White, the gentleman who sits behind me, is your district supervisor? A. Yes, sir.

Q. You work under his direction?

A. Yes, sir.

Q. Do you know Mr. Burtin? A. Yes, sir.

Q. Is he an agent? A. Yes, sir.

Q. Assigned to the San Francisco office? [120]

A. Yes, sir.

Q. Do you know Mr. Cass? A. Yes, sir.

Q. He likewise was assigned to the office?

A. Yes, sir.

Q. Both of these gentlemen have worked with you on cases? A. Yes, sir.

Q. Calling your attention to October 31, 1948, were you employed by the Bureau of Narcotics as a special agent? A. Yes, sir.

Q. On that day did you see an informer?

A. Yes, sir.

Q. Where did you first see him and with whom?

A. I first saw the informer in San Francisco with Mr. White.

Q. About what time, if you remember?

A. Approximately three o'clock, two-thirty to three o'clock.

Q. Where did the informer go?

A. The informer left my view on Bush Street in San Francisco with Mr. White.

(Testimony of William H. Grady.)

Q. When was the next time that you saw the informer?

A. The next time I saw the informer was in Oakland, near the Coca-Cola place out on 14th Street, in Oakland. He was in an automobile with Mr. White.

Q. Thereafter did you see where the informer went? [121]

A. Shortly thereafter I saw the informer and Mr. White enter the Clay-Ten Hotel on Clay Street, in Oakland, California.

Q. I show you United States Exhibit 13 for Identification, Hotel Clay-Ten. Is that the hotel which the informer entered with Mr. White?

A. Yes, sir.

Q. How did you get to Oakland?

A. I rode in a Government automobile with agents Cass and Burtin.

Q. Where did you park your car?

A. I parked the car on Clay Street, facing the Clay-Ten Hotel.

Q. Is that near Tenth?

A. No, between Eleventh and Twelfth.

Q. Then where did you go?

A. I walked down the street, after I observed Mr. White and the informer enter the Clay-Ten Hotel, and I walked down the street past the Clay-Ten Hotel, near the intersection of Tenth and Clay Streets, on Clay Street.

Q. By passing the hotel you mean you passed the entrance to the hotel?

(Testimony of William H. Grady.)

A. I passed the entrance to the hotel.

Q. Did you then stop? A. Yes, sir.

Q. Who was with you if anyone at that time?

A. Agent Burtin was with me. [122]

Mr. Deasy: I am sorry I did not hear the last.

The Witness: Agent Burtin was with me.

Q. (By Mr. Karesh): The United States Exhibit 13: Will you with this red pencil place on this photograph where you and Agent Burtin were standing? What mark have you placed there?

A. Just a straight mark in a white spot underneath.

Q. Do you want to put your initial there? Could you do it with that? It is not a very good pencil, is it? You have written the word "W.H.G." I am going to show you a photograph of an automobile. Do you recognize this photograph of an automobile? A. Yes, sir.

Q. What is the license number of the automobile? A. 17-K-120.

Q. What kind of automobile is it?

A. It is a Cadillac automobile.

Q. What color automobile, if you remember?

A. Maroon.

Q. Where did you first see that automobile?

A. I first saw that automobile on the 31st day of October, parked on Clay Street, near the corner of Tenth Street, in Oakland, California.

Q. Is that where you were standing with Agent Burtin? A. Yes, sir.

(Testimony of William H. Grady.)

Q. Was there anyone in the car when you first saw it? A. No, sir. [123]

Q. Was the car parked there? A. Yes, sir.

Q. Did you see it after the informer had entered the hotel with Colonel White? A. Yes, sir.

Q. Did you see anyone enter that automobile?

A. Yes, sir.

Q. Who entered it?

A. I saw a man who I know now as James Ballard, the defendant in this case.

Q. He entered the automobile? A. Yes, sir.

Q. At that time you took down the license number when Mr. Ballard entered the automobile, is that correct?

A. As he drove away in the automobile?

Q. You took the license number down?

A. Yes, sir.

Q. At the time that Mr. Ballard entered the automobile, had you observed the informant again?

A. Yes, sir.

Q. Was that before or after Mr. Ballard entered the automobile?

A. After Mr. Ballard entered the automobile.

Q. From where did Mr. Ballard come when he entered the automobile?

A. From the Clay-Ten Hotel. [124]

Q. How long after Mr. Ballard entered the Clay-Ten Hotel did you see the informer come out of the hotel?

A. After Mr. Ballard entered the Clay-Ten, entered the automobile and drove away——

(Testimony of William H. Grady.)

Q. Yes.

A. It was just a very few moments, perhaps five minutes—it might have been a shorter time than that.

Q. Which way did the informer go, if you remember?

A. The informer walked towards Eleventh Street, down Clay Street towards Eleventh Street.

Q. Did you or any of the other agents follow him?

A. Agent Burtin left at that time.

Q. In what direction did Agent Burtin go?

A. Walked in the same direction the informer was walking in.

Q. Do you mean toward Eleventh Street?

A. Toward Eleventh Street.

Q. What did you do?

A. I remained on Clay Street near the corner of Tenth Street.

Q. Thereafter what did you do?

A. Shortly thereafter I observed the defendant Ballard, McDonough and Ingoglia in this same automobile. They entered Clay Street from Tenth Street, making a left turn into Clay Street.

Q. Are you sure it was a left turn, or a right turn?

A. From Tenth Street it was a left turn. [125]

Q. Go ahead.

A. Mr. Ballard was driving the automobile. Mr. McDonough was in the middle, and Mr. Ingoglia was on the outside, on the side closest to me as the car drove by.

(Testimony of William H. Grady.)

Q. Did you see them stop the car?

A. Yes, sir.

Q. Where did they stop the car?

A. They stopped the car on Clay Street, near Eleventh Street.

Q. Did you follow, walk up toward Eleventh Street? A. Yes, sir.

Q. And then what happened?

A. As they—as Ingoglia left the car on the sidewalk side, and Ballard left the car on the street side, I observed Agent Burtin walking along the sidewalk, approximately ten or fifteen feet past the car at that time, at the time that they had left the car.

Q. Where did McDonough go?

A. McDonough remained in the car.

Q. Did he sit in the middle where he had been, or did he slide over into the driver's seat?

A. He was under the wheel in the driver's seat.

Q. Then what happened?

A. Ingoglia and Ballard entered the Clay-Ten Hotel.

Q. Go on.

A. Shortly thereafter I walked with Agent Burtin, walked up Clay [126] Street, and beyond Eleventh to where the Government automobile was parked.

Q. And where was the Government automobile parked?

A. It was parked on Clay Street between Elev-

(Testimony of William H. Grady.)

enth and Twelfth Streets, on the opposite side of the street from the Clay-Ten Hotel.

Q. Did anything unusual happen at that time?

A. At that time a police car drove up and stopped at the front entrance of the Clay-Ten Hotel.

Q. Will you tell me how long it was from the time you saw Ballard and Ingoglia enter the hotel until the police car came?

A. Approximately five minutes.

Q. Could it have been more?

A. Yes, it could have been seven or eight minutes.

Q. That is to the best of your recollection?

A. Yes.

Q. Did you observe McDonough when the first police car came? A. Yes, sir.

Q. Did it have the marking of a police car? Was it obvious that it was a police car?

A. It was obvious to me.

Q. What do you mean by obvious to you?

A. It had the red lights, the red light on the top of the car; it was one of these blue Fords with black fenders and a star painted on the side of the car. [127]

Q. From what direction did that police car from?

A. From the direction of Tenth Street.

Q. Where did it park?

A. It parked directly in front of the Clay-Ten Hotel.

(Testimony of William H. Grady.)

Q. Driving toward Eleventh?

A. Driving toward Eleventh.

Q. Did you observe McDonough at that time?

A. Yes, sir.

Q. What did he do, if anything, with relation to the car? Did he sit there, or did he get out?

A. McDonough remained in the automobile.

Q. Did you see another police car?

A. Yes, sir.

Q. Where did that car come from?

A. That car came from the direction of Eleventh Street, down Clay, and parked on the wrong side of Clay Street in front of the Clay-ten Hotel, both police cars facing each other.

Q. Did the second police car pass the car where McDonough was seated? A. Yes, sir.

Q. Did the police officers get out of the car?

A. Yes, sir.

Q. Did you see McDonough do anything at that time when the second police car came?

A. Yes, sir. McDonough left the Cadillac car and walked around [128] the corner of Eleventh Street.

Q. How far around the corner?

A. About, I would say, approximately six feet, six to eight feet.

Q. Was there anything unusual about his actions?

A. Yes, sir. He returned several times—I would

(Testimony of William H. Grady.)

say three or four times that he returned and peered around the corner of the building, looking down toward the Clay-Ten Hotel.

Q. You mean after the second police car came he walked to the corner, looked around, and then backed around the corner, is that correct?

A. Yes, sir.

Q. Then what did you do, Mr. Grady?

A. In the meantime Agent Burtin had gone down to the hotel and he waved, and Agent Cass and I drove in the Government automobile down Clay Street opposite—to just the opposite side of the entrance to the Clay-Ten Hotel.

Q. Who entered the hotel first? The police officers or Agent Burtin?

A. The police officers.

Q. How many police officers were in each car?

A. One.

Q. And then one officer from each car entered the hotel, followed by Burtin and then you and Agent Cass went down to the hotel, and where did you go? [129]

A. I left the automobile and Agent Cass—we double-parked. Agent Cass stayed in the Government automobile. I crossed over, met Agent Burtin, and went upstairs together.

Q. Where did you go?

A. I went to room 306.

Q. Whom did you see in room 306?

A. I saw Mr. White, and I saw two police officers.

(Testimony of William H. Grady.)

Q. By Mr. White you mean your district supervisor?
A. My district supervisor.

Q. Go ahead.

A. And I saw the defendants Leeper, Ballard and Ingoglia.

Q. By Leeper—do you recognize Leeper here?

A. Yes, sir, this is Mr. Leeper right on the end.

Q. The gentleman with the flower?

A. Yes, sir.

Mr. Karesh: Let the record show that the witness has identified the defendant, Mr. Leeper.

Q. And which is Ballard?

A. The next one.

Mr. Karesh: May the record show that the defendant Ballard has been identified by the witness.

Q. And Ingoglia?

A. Ingoglia is the fourth one.

Mr. Karesh: May the record show the witness has identified the defendant Ingoglia. [130]

Q. Now, the man in the automobile 17-K-120—do you identify that—that you say was peering around the corner after getting out of the car, can you identify him?

A. Yes, sir, Mr. McDonough, the third man between Mr. Ballard and Mr. Ingoglia.

Mr. Karesh: May the record show that this witness has identified the defendant McDonough?

May we offer for identification this car, Cadillac 17-K-120?

The Court: It may be identified.

(Testimony of William H. Grady.)

(The photograph referred to was thereupon marked U. S. Exhibit 34 For Identification.)

Q. (By Mr. Karesh): What happened in the hotel room?

A. When I walked into the hotel room and saw Mr. Leeper, Mr. Ingoglia and Mr. Ballard, I immediately asked one of the police officers to accompany me, and I left with the police officer and went down to the corner where the Cadillac automobile was parked.

Q. Was McDonough near the Cadillac automobile at that time?

A. No, sir, the keys to the car were lying in the front seat of the automobile. I looked in several of the bars around the corner but did not see Mr. McDonough.

Q. Can you explain why you did not arrest McDonough when you saw him sitting in the automobile?

Mr. Kernes: If your Honor please, I am going to object to that as calling for the conclusion of the witness. [131]

The Court: Sustained.

Q. (By Mr. Karesh): When you entered the hotel, was that the first time you knew that the drugs had been delivered to Mr. White?

A. When I entered the hotel room.

Q. Is that right? A. Yes, sir.

Q. And then you say you went down to the police station? Did you go with the officers, or what?

(Testimony of William H. Grady.)

A. I went with one officer and went downstairs and looked around the block, in the bars, and in that vicinity, but did not see Mr. McDonough. I then returned to the room and saw—talked with Mr. White and the other agents, and saw a bag containing some white envelopes.

Q. Where were the defendants at that time?

A. The defendants were in the room.

Q. Still there? A. Yes, sir.

Q. I thought you said they were taken down to the jail, or something?

A. Not at that time. They were after.

Q. Were they taken down to the jail before you went down to look to see whether you could find McDonough?

A. Oh, no, they were still in the room. I just went to the room, went right back down to look for McDonough, couldn't find him, [132] and then they were taken to the jail.

Q. Who took them to the jail, if you know?

A. I don't remember.

Q. Then what did you do?

A. I then went to a police officer in Oakland, Police Officer Hand, and gave him a description of the man who was standing at the corner.

Q. You mean McDonough?

A. McDonough.

Q. Did you attempt to find McDonough thereafter? A. Yes, sir.

Q. What efforts did you use to find McDonough?

(Testimony of William H. Grady.)

A. Well, we went to Souza's Bar, on, I believe it is, Twelfth and Franklin, in Oakland, and then talked to Mr. Souza, there, and he said that McDonough had been staying——

Q. No, that would be hearsay. What I am trying to find out, did you make any effort to locate Mr. McDonough? A. Yes, sir.

Q. Without relating any conversations, just tell us where you went to locate him, whom you spoke to, without relating what was said.

A. First I went to Police Officer Hand, and then from his place went over to Souza's Bar, and from Souza's Bar I went to Souza's home.

Q. Go ahead.

A. At that time I left Oakland and returned to San Francisco. [133]

Q. Do you know when it was that McDonough was apprehended, or when he surrendered?

A. Approximately November 5th.

Q. Did your office make an intense search to find him during that time?

A. Yes, we notified several people and attempted to locate the defendant.

Q. And you were in San Francisco, is that right? A. Yes, sir.

Q. Do you know whether any accounts of the fact that Mr. McDonough was wanted appeared in the newspapers?

A. Yes, sir; yes, sir, I read an account of the names of all of the defendants in this case.

(Testimony of William H. Grady.)

Q. Was a complaint sworn for McDonough's arrest? A. Yes, sir.

Q. When? Do you recall?

A. The next day, on November 1st.

Q. And the accounts appeared in the daily newspapers saying McDonough was charged with violation of the narcotic statutes, is that correct?

A. Yes, sir.

Q. And you say he surrendered on November 5th? A. Yes, sir.

Q. 1948. Calling your attention to these envelopes, United States Exhibits 1 through 12 For Identification, will you examine [134] those envelopes, each one of them separately, and tell me whether your initials appear thereon.

A. Yes, sir, my initials are on each package.

Q. Who else's initials are on there?

A. The initials of Mr. White, Mr. Burtin, Mr. Cass; the chemists' initials, Mr. Hubach, Mr. Love, Mr. Stribling, and Mr. Mallory.

Q. You had better look at each package and tell me whether the initials you read out appear on each envelope.

A. Mr. Stribling's initials does not seem to appear on this package, the chemist.

Q. Who? A. Mr. Stribling, the chemist.

Q. Stribling or Hubach?

A. Hubach is one of the chemists, but Stribling is another one.

Q. The initials which you read appear on all of

(Testimony of William H. Grady.)

these envelopes that you have just examined?

A. Yes, sir.

Q. Examine U. S. Exhibits 20 through 31, these envelopes, and tell me whether your initials appear thereon.

A. Yes, sir.

Q. There are other initials on them?

A. Yes, sir.

Q. Examine this paper and tell me whether your initials appear thereon. [135]

A. Yes, sir, they do.

Mr. Karesh: This is United States Exhibit No. 18 which I have just shown the witness.

Q. Examine United States Exhibit No. 19 For Identification and tell me whether you have ever seen that before, the contents.

A. Yes, sir.

Q. You say that your initials are on U. S. Exhibit 12 For Identification and U. S. Exhibits 20 through 31 For Identification, and U. S. Exhibit No. 18 For Identification; you have also identified the contents of U. S. Exhibit No. 19 For Identification. Now, tell the court and the jury under what circumstances you placed your initials upon these various packages, and under what circumstances you examined U. S. Exhibit 19 For Identification.

A. The packages containing the drugs No. 1 to 12—

Q. Yes, sir.

A. The packages containing the drugs were, when I put my initials on those, at the time Agent Cass removed—

(Testimony of William H. Grady.)

Q. What date was this?

A. This was on November 1st.

Q. Where?

A. In the narcotic office, Room 2104, 100 McAllister Street, San Francisco.

Q. Who was present?

A. Mr. White and Mr. Cass. [136]

Q. Go on.

A. At that time the narcotics——

Q. Bear in mind that this is 18, the paper sack.

A. When Mr. Cass first brought the package from the vault into the room, all of the envelopes—these brown ones, what are the numbers on those?

Q. You mean these discolored ones?

A. Yes.

Q. 20 through 31.

A. 12 of those, this brown paper bag—is that Exhibit 19?

Q. The brown paper bag is Exhibit 18.

A. 18—well, Exhibit 18 contained these twelve envelopes.

Q. Anything in these twelve envelopes, 20 through 31?

A. Yes, sir, these cellophane bags were on the inside.

Q. One cellophane bags were on the inside.

Q. One cellophane bag on the inside of each of these envelopes 20 through 31; the cellophane bags you are now speaking about were in the package 19

(Testimony of William H. Grady.)

For Identification. Who broke the envelopes or cut them open? A. Mr. Cass.

Q. What did he do then?

A. He took out the contents of each envelope.

Q. The cellophane bag?

A. The cellophane bag, emptied the cellophane bag onto a sheet of paper, weighed the narcotics, and then put them into [137] the other envelopes, the other twelve envelopes. As he emptied each envelope and cellophane bag, he turned the bags over to me.

Q. As I understand it, he placed the contents of the original envelopes in glassine bags, inside the white envelopes U. S. Exhibits 1 through 12 For Identification, right? A. Yes, sir.

Q. In other words, in every one of these envelopes——

A. There was a cellophane bag inside of it.

Q. That is right. The contents of the cellophane bag inside one of these envelopes went into one of the white envelopes? A. That is correct.

Q. Then what happened?

A. Mr. White and Agent Cass and myself initialed both sets of envelopes, and I then in the presence of Mr. White and Mr. Cass, treated these envelopes.

Q. By “these envelopes” you do not mean 1 through 12, the white envelopes; you mean 20 through 31, is that correct?

(Testimony of William H. Grady.)

A. 20 through 31, yes, and also the cellophane wrappers.

Q. Contained in U. S. Exhibit 19 For Identification?
A. 19, and the paper bag.

Q. U. S. Exhibit 18 For Identification, is that correct?
A. Yes, sir.

Q. Now, there are discolorations on the bag that came from the chemical treatment.

A. Yes, sir, that came from the silver nitrate treatment to develop any latent fingerprints that were on the package. [138]

Q. What was the color of these envelopes 20 to 31 from which the narcotics were originally taken out of the bag?

A. These envelopes were white, even whiter than this—this is 25—the back of Exhibit 25 has darkened up somewhat, but of course, it is not as dark as the others, but it was a white envelope.

Q. Was the color of the envelopes the same?

A. Yes.

Q. All the 12 envelopes the same?

A. All 12 envelopes were the same color and appearance.

Q. All the same size, length and width?

A. Yes, sir.

Q. Were you wearing gloves when you went through the process of treating these envelopes and this paper bag?
A. Yes, sir.

Q. And what result, as far as fingerprints were concerned?

(Testimony of William H. Grady.)

A. There are—several fingerprints were developed, several smudges and some—a few that were legible, that really could be read.

Q. Now, then, you photographed a certain print, latent print from one of these envelopes?

A. Yes, sir.

Q. And I think that is U. S. Exhibit 31 for identification. Will you examine it and tell me if that is the one from which [139] you photographed the latent print thereon?

A. Well, I photographed—I have several photographs, but this is one of the ones that were photographed.

Q. You are referring to a print on U. S. Exhibit 31 that has a green circle, is that correct?

A. Yes.

Q. Is your initials alongside of it?

A. Yes, sir.

Q. And what did you do with the photographs?

A. The photographs were submitted through official channels to our New York office.

Q. And do you know who in your New York office examines prints?

A. They were turned over to Mr. Green of the Alcohol Tax Unit, who is the expert on fingerprints for our office in New York.

Q. You sent the photographs of the prints back to New York and then what happened? Did Mr. Green come out to San Francisco?

A. Yes, sir.

(Testimony of William H. Grady.)

Q. And did you then give to Mr. Green to take back to New York with him U. S. Exhibit 31 for identification?

A. Well, this is one of the envelopes that I gave to Mr. Green when he was here from New York.

Q. How many more did you give to him besides that? A. Four others.

Q. He took U. S. Exhibit 31 and four other of these envelopes back to New York, is that right?

A. Yes, sir, that is correct.

Q. And when did you see the envelopes again, including U. S. Exhibit 31 for identification?

A. On the 6th of June of this year.

Q. Now, you treat—we will just refer now to U. S. Exhibit 31 for identification, you say you treat the envelope to find prints, latent prints?

A. Yes, sir, we used—in our office we use approximately a one per cent of silver nitrate, and the chemical action of silver nitrate combines with the salt in the perspiration that is on the skin, forming a white substance, silver chloride, and that is treated with sunlight and it breaks down into silver and chloride and the silver darkens and you have as a result a pattern that marks out the pattern on the skin.

Q. Now, let me ask you, when you treat this print here which is encircled with green and I put my fingers on it, that can't rub off, can it?

A. No.

(Testimony of William H. Grady.)

Q. How long should that print remain after it is treated?

A. It should remain for five or ten years if it isn't put in bright sunlight.

Q. But if I put my finger over it, it won't rub out or ruin that latent print, will it?

A. No, sir.

Q. But if the thing had not been treated and I placed my finger [141] there and pressed it firmly, I might obliterate the original print, is that right?

A. Yes.

Mr. Dunning: May we see that exhibit?

Mr. Karesh: Yes (handing document to counsel).

Q. Mr. Grady, just for the purposes of clarification, can you tell me how soon after the informer came out of the hotel would you say Ballard came out of that Cadillac automobile 17-K-120?

A. I would say approximately three minutes, five minutes—I wouldn't give a definite statement as to the exact minutes, but it was three minutes or five minutes, a very short time.

Q. That is the best of your recollection?

A. That is right.

Q. Now, I just want to get this straight: Ballard came out first and then the informer came out?

A. Yes, sir.

Q. In other words, Ballard came out and entered the car and about three minutes later or five minutes the informer came out and you followed him?

(Testimony of William H. Grady.)

A. He came out; I didn't follow him, I saw him leave toward Eleventh Street and I saw Agent Burtin follow him.

Mr. Karesh: That is all, Mr. Grady.

Cross-Examination

By Mr. Kernes:

Q. A few questions, Mr. Grady. I believe it was your testimony that you saw the informer, Mr. Mallibee, [142] on the 31st day of October of last year?

A. On the 31st day of October? Yes, sir, that is correct.

Q. And do you recall what time of day that was?

A. I would say from 2:30 to 3:00 o'clock.

Q. And do you recall just where that was?

A. I don't know the address. It was on Bush Street.

Q. I see. Did you drive from your office on McAllister Street to Bush Street?

A. No, sir. It was on a Sunday. I came from home.

Q. Now, were you called to come from home?

A. Yes, sir.

Q. That particular day? A. Yes, sir.

Q. Did you know prior to the 31st day of October 1948 that you were going to go out that afternoon? A. No, sir.

A. Yes, sir—a government car.

Q. I see. Did you drive your car down?

(Testimony of William H. Grady.)

Q. You drove the government car?

A. Yes.

Q. In other words, you drive the government car home so you can use it if you need to?

A. Yes, sir.

Q. Did you pick up Agent Burtin?

A. Yes, sir. [143]

Q. And Agent Cass?

A. No, Agent Cass came in his automobile. He has a government automobile.

Q. I see. Did you talk to Col. White—that is your district supervisor?

A. Well, we met at his place on Bush Street.

Q. You met at the Colonel's place?

A. Yes.

Q. It was the Colonel's address? A. Yes.

Q. He resides on Bush Street?

A. He did at that time.

Q. I see. He was your district supervisor, is that correct? A. Yes, sir.

Q. You don't recall his address, do you?

A. No, I couldn't—I was only up there that one time.

Q. I see. Do you recall his phone number?

A. No, sir.

Q. Mr. Grady, how long have you been a special agent for the Narcotics Bureau?

A. Approximately seven years.

Q. And how long have you been in the San Francisco office? A. Seven years.

(Testimony of William H. Grady.)

Q. Have you at any time during those seven years had occasion to know or hear of—and I specifically refer to this seven years [144] immediately prior to October 31, 1948—have you had occasion to know or hear of the defendant Patrick McDonough? A. No, sir.

Q. Did Agent Cass drive his car over to Oakland?

A. Mr. Cass—we left my car on Bush Street and Agent Burtin and myself went to Oakland with Mr. Cass.

Q. When you arrived at Bush Street, Mr. Grady, did you go up into the apartment itself?

A. Yes, sir.

Q. And do you recall—was that an apartment, by the way? A. Yes, that was an apartment.

Q. And could you recall what floor that apartment was on?

A. It was walking distance. I think it was on the second floor.

Q. I see. About how many rooms does that apartment have?

A. It is my recollection it had one room and a kitchen and a bath.

Q. That was your district supervisor White's apartment?

A. I think he had a temporary apartment while he was looking for another one. That is my understanding.

Q. I see. Now, in whose automobile did Mr. White drive to Oakland?

(Testimony of William H. Grady.)

A. I don't know whose automobile it was, but Mallibee was driving.

Q. Mallibee was driving. Mallibee was the informer, correct? Isn't that correct? [145]

A. Yes, that is correct. That is the name I knew him by.

Q. The government cars, they are not marked any specific way, are they? A. No, sir.

Q. So actually unless you absolutely know the individual car, you couldn't tell it from any other car, could you? A. No.

Q. Did you follow Mr. Mallibee and Mr. White or did they follow you driving across to Oakland?

A. I really don't know. It is my recollection that we made arrangements to meet by the Coca-Cola place on Fourteenth Street in Oakland.

Q. That would be Fourteenth and Peralta Streets, is that correct?

A. Yes, just after you turn off the lower highway there. I think it is Peralta.

Q. And that was on the bridge approach coming off in Oakland, is that correct? A. Yes.

Q. Mr. Grady, you did meet there. Did you park your car at the time? A. No.

Q. Was there any conversation had with either Mr. Mallibee or Mr. White at the time?

A. No. As I recall, Mr. Cass blew the horn and they just went [146] ahead and we followed.

Q. Mr. Cass was driving? A. Yes.

Q. And did you follow Mr. Mallibee and Mr.

(Testimony of William H. Grady.)

and Eleventh, is it not, and the building is actually the corner of Tenth and Clay?

A. Yes, sir, that is correct.

Q. And you parked your car between Eleventh and Twelfth on Clay, is that correct?

A. Yes.

Q. On which side of the street did you park your car, Mr. Grady?

A. On the opposite side from the hotel.

Q. On the opposite side. Did you remain by your automobile?

A. At what time, counsel—when we first came up?

Q. Yes. A. No.

Q. I believe you testified, if I am not mistaken, that you and Agent Burtin went walking up the street toward the hotel, did you not? A. Yes.

Q. And you observed a Cadillac automobile?

A. After we had observed Mr. White and the informer enter the Clay-Ten Hotel, we observed this Cadillac automobile. [149]

Q. Did you see the Cadillac automobile before Mr. White and Mr. Mallibee entered the hotel?

A. No, sir.

Q. Now, do you recall just where that Cadillac automobile was parked? A. Yes, sir.

Q. Where, sir?

A. Right near the corner of Tenth Street on Clay Street, facing Eleventh.

Q. Was this the first automobile parked near that corner?

(Testimony of William H. Grady.)

A. It was the first automobile that was parked there. Whether it was parked in the first zone or not, I wouldn't say.

Q. In other words, Mr. Grady, there was no automobile parked immediately behind it toward Tenth Street? A. No.

Q. Now, in driving up to the vicinity of the Clay-Ten Hotel, to Tenth and Eleventh on Clay, did you drive on Clay Street?

A. When Mr. Cass was driving and we entered the vicinity?

Q. That is right. A. I don't know.

Q. As Mr. Cass drove in that vicinity, did you have occasion to be on the lookout for the Cadillac automobile? A. No, sir.

Q. Those were your instructions, were they not?

A. The instructions—we didn't drive by the hotel, as I recall [150] it, counsel. We drove up between Eleventh and Twelfth and parked the automobile and we immediately left the automobile.

Q. In other words, you drove up Clay Street toward Tenth?

A. Toward the hotel. That is my recollection.

Q. Now, then, prior to this time had you ever seen the defendant Ballard?

A. No, sir—prior to the time that I came to Oakland?

Q. Prior to October 31, 1948. A. No, sir.

Q. Or the defendant Ingoglia?

A. Well, I am not——

(Testimony of William H. Grady.)

Q. Had you ever seen him, sir?

A. What?

Q. Had you ever seen him?

A. I can't say definitely. I am not sure whether I saw him or not.

Q. All right. Now, it was your testimony, sir, was it not, that Mr. Mallibee and Mr. White entered the hotel together? A. Yes, sir.

Q. Do you know where Mr. Mallibee parked the automobile he was driving?

A. Over there around Eleventh Street. Whether it was on Clay—I believe it was on Clay just a little above Eleventh.

Q. That would be on Clay Street between Eleventh and Tenth?

A. I might be wrong on that, but it was right around the corner [151] somewhere, is my recollection.

Q. Did you see the automobile?

A. I saw the automobile on the way over.

Q. Did you see him park it? A. No.

Q. You did, however, testify that you saw Mr. White and Mr. Mallibee walk towards the entrance of the hotel. A. Yes.

Q. I believe you further testified that you and Agent Burtin followed Mr. Mallibee and Mr. White, is that correct?

A. Followed them to the hotel?

Q. As they were walking to the hotel.

A. Yes, I believe that is correct.

(Testimony of William H. Grady.)

Q. Now, were you walking toward the hotel when Mr. Mallibee and Mr. White entered the hotel?

A. Yes, sir.

Q. Did you at that time investigate the vicinity for any Cadillac automobiles?

A. We didn't leave the vicinity of Clay Street between Tenth and Eleventh. The information was—according to the information that Mr. White had given me, the automobile would be parked on Clay Street.

Q. In other words, from the information that you had, you knew that if the Cadillac was going to be there, it would have been parked on Clay Street, is that correct? That is in accordance [152] with the information given you by Mr. White in the apartment on Bush Street, is that correct?

A. Yes, the information was that there was a Cadillac automobile involved in this deal and that it quite possibly would be used—it quite possibly would be parked on Clay Street near the hotel.

Q. That was your testimony that a short period of time elapsed after Mr. Mallibee and Mr. White entered the hotel when the defendant Ballard came out, is that correct? A. Yes, sir.

Q. About how long a period of time—I will withdraw that. Did you or Agent Burtin or Agent Cass, of your knowledge, follow that Cadillac automobile when it drove away? A. I didn't follow it.

Q. Did you know what was going to happen in the vicinity of Clay and Tenth on that afternoon, of

(Testimony of William H. Grady.)

your own knowledge?

A. Only what Mr. White had told me.

Q. Now, that was what, again, sir?

A. The only thing I knew is what Mr. White had told me in the apartment in San Francisco on Bush Street.

Q. And I believe you have testified that that was with regard to the Cadillac automobile?

A. Yes.

Q. But you didn't know what was going to happen other than look for that automobile, did you?

A. Naturally I knew there was going to be a narcotic investigation.

Q. Naturally, being a narcotic agent, but did you know what was going to happen? A. No.

Q. And this Cadillac automobile drove away after Mr. Mallibee and Mr. White entered the hotel, is that correct? A. Yes, that is correct.

Q. And that is the Cadillac automobile you were watching, is that correct?

A. I wasn't specifically watching it, I was standing on the street, I saw a Cadillac automobile, I noticed the car and stood around waiting for something to happen.

Q. In connection with that Cadillac automobile?

A. In connection with narcotics.

Q. You were interested in that Cadillac automobile?

Mr. Karesh: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

(Testimony of William H. Grady.)

A. I was interested in the Cadillac automobile only in so far as that it might lead me to a narcotic violation—the movements of the car might furnish me with information that would aid me in this investigation.

Q. And your instructions, of course, were to investigate and attempt to find a Cadillac automobile on that block, is that [154] correct?

A. No, sir, the instructions that I had were that a Cadillac automobile might be used in this violation of the narcotic laws and that I should keep that information in mind as I made my observations in front of the hotel.

Q. Now, Mr. Grady, when you saw a person or a man leave that hotel, someone you had not known up to that time, and enter that automobile, weren't you interested in that?

A. Yes, mildly, you might say I was mildly interested in it.

Q. Not sufficient to make you get up and want to follow it, is that correct? A. No, sir.

Q. Now, then, from the period of time that that automobile pulled away from the vicinity of Clay and Tenth, how long a period of time elapsed until Mr. Mallibee came out of the hotel? I believe you testified he did.

A. Oh, yes, he came out of the hotel. I would say approximately five minutes. It could be a few minutes either way, but I think three or five minutes.

(Testimony of William H. Grady.)

Q. Now, when Mr. Mallibee left the entrance of that hotel on Clay Street just midway or approximately midway between Tenth and Eleventh, where were you, sir?

A. I was right along in here where I have the red line, counsel, (indicating on photograph).

Q. I see. And where was Agent Burtin? [155]

A. He was standing right beside me.

Q. And Agent Cass?

A. I didn't see Agent Cass at that time, but I presume he was in the automobile.

Q. Did you see where Mr. Mallibee went?

A. I saw Mr. Mallibee walk to the corner of Eleventh and cross the corner of Eleventh.

Q. That is cross Eleventh on Clay?

A. On Clay.

Q. And then where did he go?

A. I don't know where he went from there.

Q. Do you know whether or not he turned on Eleventh? A. No, I can't say.

Q. I believe it was your testimony that Agent Burtin followed him?

A. Agent Burtin left me in the same direction that the informer was walking.

Q. Now, you have testified that a Cadillac automobile came up again, is that correct, drove up in front of the hotel?

A. The same Cadillac automobile.

Q. When you saw that automobile, the automobile that you were mildly interested in, Agent

(Testimony of William H. Grady.)

Grady, you were interested sufficiently to take a license number, were you not? A. Oh, yes.

Q. And to fix a description of it in your mind?

A. Oh, yes. That is a very common occurrence with me.

Q. And you recognized it as coming up again?

A. Yes, sir.

Q. I believe it was your testimony that the defendants Ingoglia, Ballard and McDonough were in that automobile, is that correct?

A. Ingoglia, Ballard and McDonough, yes, that is correct.

Q. Now, at the time that automobile drove up, were you still in the same position near the barber-shop at the entrance of the hotel on Clay Street?

A. Back down here, I think that is a bar—well, it was just beyond the barbershop.

Q. In other words, the entrance to the hotel was between you and the Cadillac when the Cadillac parked, is that correct? A. No, sir.

Q. Now, wasn't it your testimony that when that Cadillac automobile drove up for the second time it parked near the intersection of Eleventh and Clay Streets? A. That is correct.

Q. Now, wasn't it your further testimony that at the time it drove up and at the time Mr. Mallibee left the hotel, you were standing near the corner of Tenth and Clay?

A. I was standing at Tenth and Clay here (indicating), and when the automobile first left it was

(Testimony of William H. Grady.)

parked just about where this light car is along right in here. This is where I was standing, and when it returned it parked up here near the corner [157] (indicating).

Q. What I want to know, Mr. Grady, is where you were standing when that Cadillac returned.

A. Down on this corner, down in front of the bar here (indicating on photograph).

Q. In other words, you were near Tenth and Clay? A. Near Tenth and Clay.

Q. So the entrance of the hotel was between you and the Cadillac automobile, is that correct?

A. Yes.

Q. And you could see the rear of the automobile, is that correct? A. Yes, sir.

Q. And it was parked on the same side of the street that you were standing?

A. On the same side, that is correct.

Q. By the way, were there any automobiles parked in between the Cadillac and the entrance to the Clay-Ten Hotel? A. I don't believe so.

Q. Now, then, it was your further testimony that you saw two of the defendants, I believe you have testified, the defendants Ingoglia and Ballard, leave the automobile. A. Yes, sir.

Q. And enter the hotel? A. Yes. [158]

Q. Did you remain standing and watching the entrance to the hotel? A. No, sir.

Q. What did you do then?

A. I walked up toward the entrance to the hotel and I met Agent Burtin,—

(Testimony of William H. Grady.)

Q. I see.

A. —he was walking down and I called his attention to Ingoglia at that time.

Q. The defendant Ingoglia had already entered the hotel, had he not?

A. No, he was walking down towards the hotel.

Q. Now, Agent Burtin, he was down near the intersection of Eleventh and Clay, right?

A. He was walking towards me, towards Tenth.

Q. When the automobile drove up?

A. When the automobile drove up.

Q. All right. Now, after the defendants Ballard and Ingoglia entered the entrance of the hotel, where were you standing?

A. We had walked—after I had spoken to Agent Burtin and we had walked back—we walked back to Tenth—close to Tenth Street on Clay Street.

Q. In other words, you were near the entrance of the hotel?

A. We were back there where I had originally pointed out.

Q. In other words, you were approximately two or three doors [159] from the entrance of the hotel?

A. The car parked here; Agent Burtin was walking down this way; I walked up this way, I met Agent Burtin right along in here, somewhere along in here, and as I met him I spoke to him and we turned and walked back down here (indicating on photograph).

Q. And as you were walking back down there,

(Testimony of William H. Grady.)

you were walking away from the Cadillac automobile, is that correct? A. Yes, sir.

Q. You testified that you saw a police car drive up, is that correct? A. Yes, sir.

Q. Where were you standing at the time the police car drove up?

A. At the time the police car drove up, I was across the street, I had walked out of that neighborhood and walked over to where the car was parked, the government automobile was parked.

Q. You walked to where the government car was parked? A. Yes.

Q. In other words, you left the entrance of the hotel, is that correct?

A. Well, I hadn't been in the hotel up to this time.

Q. Well, you were near the entrance of the hotel? A. Yes.

Q. And you walked on the other side of the hotel?

A. No, I walked past the hotel, walked up to the corner that is shown in the picture there (indicating on photograph). [160]

Q. This corner here?

A. Then I crossed the street and over to the automobile.

Q. You had walked past the Cadillac at that time? A. Yes.

Q. Was there anyone in the Cadillac when you walked by it? A. Yes.

(Testimony of William H. Grady.)

Q. Who? A. McDonough.

Q. Approximately how far were you from the entrance of the hotel at this time?

A. At the time I walked by?

Q. When you stopped in your government car.

A. Approximately 500 feet, five or six hundred feet.

Q. It was Sunday afternoon, was it not?

A. Yes.

Q. What time of the day or night?

A. Oh, possibly 4:00 o'clock.

Q. Did you hear any unusual sounds or noises?

A. Yes, sir, we heard a sound; we thought it was a backfire of an automobile.

Q. You didn't suspect that to be anything else but a backfire, did you?

A. It didn't sound like anything else to me.

Q. Now, you testified that when the second police car came up you saw the defendant McDonough leave the automobile? [161] A. Yes, sir.

Q. I believe it was your testimony further you saw him go around the corner of Clay Street onto Eleventh Street? A. Yes, sir.

Q. And look back several times?

A. Yes, sir.

Q. Around the corner?

A. Yes, sir, that is correct.

Q. I believe further it was your testimony that you walked back to the entrance of the hotelway, is that correct?

(Testimony of William H. Grady.)

A. No, sir. No—what I did, I was up in the government automobile——

Q. Yes, I know you were.

A. ——then we drove the automobile down, after we received a signal from Agent Burtin we drove the automobile down Clay Street. Agent Cass doubleparked the automobile on Clay Street and I got out and walked across the street to the hotel.

Q. You entered the hotel? A. Yes.

Q. You drove up in the elevator?

A. Went up in the elevator.

Q. How many elevators does the hotel have, Mr. Grady? A. I only saw one.

Q. Did you enter—did you get off on the third floor? A. Yes, sir. [162]

Q. Did you enter this room 306?

A. 306, yes, sir.

Q. And searching your memory carefully, Mr. Grady, tell me what you saw when you entered the room 306?

A. When I entered Room 306, it is my best recollection that Ingoglia and Ballard were sitting on the floor with their back up against a dresser and two police officers were standing inside the door and Mr. Leeper was standing close to the door to the bathroom.

Q. He was standing up, Mr. Leeper?

A. The defendant Leeper at the time I entered the room, he was standing up.

Q. Did you see your District Supervisor White?

(Testimony of William H. Grady.)

A. Oh, yes.

Q. Where was he?

A. He was standing alongside of the bed, as I recall it. He moved around—I was in the room for approximately two minutes at that time.

Q. Did any of the police officers have guns in their hands? A. No.

Q. Did Col. White have a pistol in his hand?

A. No.

Q. Did he have anything in his hand?

A. No, sir, I don't believe so.

Q. How large is that hotel room, sir? [163]

A. Oh, I would say 12 by 14.

Q. Now, could you describe its furnishings to me? A. There is a bed——

Q. Is that a double bed or a single bed?

A. A double bed.

Q. All right, sir.

A. There is a dresser in the far corner from the street, the far side from Clay Street; there is a clothes closet on the righthand side as you enter the door; going from there along that wall is a door that enters into the bathroom. That is my recollection of the room.

Q. Were there any chairs in the room?

A. Yes.

Q. Any tables?

A. I can't say. It seems as though I recall of a chair. I can't say about tables. It didn't impress my mind, anyway.

(Testimony of William H. Grady.)

Q. When you entered the room, was there anything on the bed? A. Yes, sir.

Q. What?

A. This envelope—there was a bag containing some white envelopes.

Q. Now, it is your testimony you heard a backfire, is that correct?

A. It is my testimony that I heard a sound that I thought was a backfire.

Q. How long a period of time elapsed from the time you heard [164] that sound until the time you got up into that room?

A. Perhaps ten minutes.

Q. Now, did you notice any other paper sacks or bags in that room?

A. No, no, sir; yes, I believe there was a bag, I believe there was a bag of money, but Mr. White had that in his hand, if I remember correctly.

Q. Mr. White did have something in his hand when you entered the room?

A. You refreshed my memory on that, counsel.

(Recess.) [165]

The Court: You may proceed.

Q. (By Mr. Kernes): Mr. Grady, I believe it was your testimony on direct examination that a complaint was issued for the defendant McDonough? A. Yes, sir.

Q. Do you recall just when that complaint was issued? A. No, sir; no, sir.

Mr. Kernes: I believe that is all.

(Testimony of William H. Grady.)

Cross-Examination

By Mr. Dunning:

Q. Mr. Grady, after you arrived in Oakland and proceeded to the vicinity of the Clay-Ten Apartments, you observed the informer Malibee and Agent White enter the Clay-Ten Apartments, is that your testimony? A. The Clay-Ten Hotel.

Q. The Clay-Ten Hotel. A. Yes, sir.

Q. You made that observation?

A. Yes, sir.

Q. You then next observed the defendant Ballard come out of the Clay-Ten Hotel?

A. Yes, sir.

Q. As I understand it, some five minutes or more later you observed the informer Mallibee come out of the Clay-Ten Hotel?

A. It is very difficult, Mr. Dunning, to place the time, to state definitely whether it was three minutes, five minutes or [166] four minutes. The whole transaction took place in a matter of a half an hour.

Q. I am trying to get your best recollection, your approximation of the time. I understood you said somewhere between three to five minutes elapsed from the time Ballard came out to the time Malibee, your informer, came out of the hotel.

A. That is correct.

Q. You observed Ballard enter this Cadillac car that you referred to?

A. Yes, sir, that is correct.

(Testimony of William H. Grady.)

Q. He left the vicinity where that car was parked by the Clay-Ten Hotel and went elsewhere in it, is that correct? A. That is correct.

Q. After you made that observation, what, if anything, did you do?

A. After Mr. Ballard left in the Cadillac automobile?

Q. That is correct.

A. I remained in the same place that I had been on Clay Street, near the corner of Tenth Street.

Q. Near the corner of Tenth?

A. Of Tenth, on the same side of the street as the entrance to the hotel.

Q. So that neither yourself nor any other agents followed Ballard in the automobile referred to?

A. Agent Burtin nor myself did. [167]

Q. All three of you remained in your respective positions, is that correct?

A. I couldn't see Agent Cass—I didn't see Agent Cass from where I was at, but I don't believe that he did.

Q. You later made the observation that this same Cadillac automobile returned to the vicinity of the Clay-Ten Hotel, is that correct?

A. Yes, sir.

Q. What did you do between that time and the time when Ballard left in the Cadillac car? What were your movements during that period of time?

A. Well, I would say all in a matter of probably ten or fifteen feet; I was just waiting.

(Testimony of William H. Grady.)

Q. You just remained at your post?

A. Remained in that vicinity that I was in.

Q. What period of time was that? How long was Ballard gone?

A. Oh, approximately ten to fifteen minutes.

Q. Ten or fifteen minutes. Well, would you say it was more 15 than 10?

A. Well, I couldn't—I wouldn't want to say definitely that it was 10 minutes if it was 12, or I wouldn't want to say it was 15 if it was 14.

Q. Well, from what you say it may have been 20?

A. Yes, it was either 10 or 15. That is my best recollection, in between those. [168]

Q. You observed Ingoglia step out of the Cadillac car being driven by the defendant Ballard, is that correct?

A. The first time I saw Ingoglia on that day was after the automobile had pulled into Clay Street, and I noticed that it was observing me very closely.

Q. That is your conclusion, is it not? That is your own conclusion?

A. His eyes were on me. He was approximately 20 feet from me.

Q. About 20 feet?

A. Approximately 20 feet from me at the time.

Q. There was nothing unusual about Mr. Ingoglia getting out of the car? A. No.

Q. He merely stepped out of the Cadillac car, isn't that correct? A. Yes, sir.

(Testimony of William H. Grady.)

Q. You observed no package in his hand or upon his person, did you? A. No, sir.

Q. And you say you were ten or fifteen feet——

A. Approximately 20 feet from him while he was in the car, while he was driving, his car was moving along the street. The first time that I had seen Mr. Ingoglia on that day was when he was approximately 20 feet from me.

Q. As he was getting out of the car?

A. No, as he was riding in the automobile, and the automobile [169] passed where I was standing.

Q. I see. He was in the car as he passed you and then the car proceeded to some other position.

A. Yes, sir, the car proceeded down the street.

Q. How far were you from the car when it finally parked? A. Well, I would say 150 feet.

Q. About 150 feet? A. Yes, sir.

Q. Mr. Ingoglia stepped out of the car as did Mr. Ballard, is that correct? A. Yes, sir.

Q. There was nothing unusual in his movements on that occasion, was there? A. No, sir.

Q. You saw no narcotics upon his possession, nor any object, did you? A. No, sir.

Q. So at that particular point of time you had no reason to believe that Mr. Ingoglia had in his possession the package that has been referred to or identified to by the Government?

Mr. Karesh: We object to that, your Honor.

The Court: Yes, sustained.

(Testimony of William H. Grady.)

Q. (By Mr. Dunning): You observed, then, the defendant Ballard and Ingoglia enter the Clay-Ten Hotel, is that correct? A. Yes, sir. [170]

Q. And the other agents were in the vicinity and outside of the Clay-Ten Hotel at that particular time? A. Yes, sir.

Q. Did any of the agents or yourself follow either Ingoglia or Ballard inside of the hotel?

A. No, sir.

Q. You did not? A. No, sir.

Q. By the way, what happened to your informer, Mallibee, after he left the Clay-Ten Hotel? Didn't you or any of the other agents follow him?

A. Another agent followed him.

Q. How long did you remain outside of the Clay-Ten Hotel after Ballard and Ingoglia entered the hotel?

A. I would say—you mean down on the corner of Clay Street at Tenth?

Q. That is where I understand you were, Clay and Tenth.

A. Yes, but I moved then—I remained in that position for approximately five minutes and then went on up the street to the government automobile.

Q. That was between Eleventh and Twelfth?

A. Between Eleventh and Twelfth.

Q. So you walked the entire block from Tenth to where the car was between Eleventh and Twelfth?

A. Yes, sir. [171]

Q. Now, some period of time expired there. How

(Testimony of William H. Grady.)

long did you remain outside and what was that time?

A. From the time—what you want, Mr. Dunning, as I understand it, is the time from the time Mr. Ingoglia and Mr. Ballard entered the hotel until the time that I entered the hotel?

Q. That is correct.

A. I would judge ten minutes, twelve minutes.

Q. Ten or twelve minutes? A. Yes, sir.

Q. How long before you entered the hotel did you see police cars?

A. That was a matter of four or five minutes—three minutes.

Mr. Dunning: I have no further questions.

Q. (By Mr. Karesh): Mr. Grady, did you see how——

The Court: Just a minute. Do any of the other defense counsel wish to ask any questions?

Mr. Ehrlich: No questions.

Mr. Deasy: No questions, your Honor.

Redirect Examination

By Mr. Karesh:

Q. Mr. Grady, did you see how Mr. Ingoglia was dressed when he got out of the car and went into the hotel? A. Yes, sir.

Q. How was he dressed?

A. Mr. Ingoglia wore a gray hat and a chamois leather coat, a sport coat, a long coat that came about half way between his pockets and his knees.

Q. Would you call it a full coat?

(Testimony of William H. Grady.)

A. Full coat—well, full coat—nearly a three-quarter-length coat.

Q. By “full” I mean was it a tightly-fitting coat or a loose coat?

A. It was a loose coat, and it was belted in the middle.

Recross-Examination

By Mr. Dunning:

Q. With a belt in the middle, did you say?

A. Yes, with a full belt that was tied in front.

Q. Mr. Grady, you testified concerning certain prints, one in particular taken from the Government’s Exhibit 31 For Identification. How many specimens in all did you take, fingerprints?

A. I developed, attempted to develop fingerprints on all twelve of the envelopes.

Q. How about the paper bag that is referred to here, first U. S. Exhibit No. 18.

A. That was also treated.

Q. This was also treated for fingerprints?

A. Yes, sir. You can see the smudges of the fingerprints on there.

Q. Did you develop your specimens from this bag? A. No, they were not legible.

Q. There were not any fingerprints taken from this bag?

A. The fingerprints that were on that bag are not legible enough to determine any points of comparison so that they could [173] be compared to some person or suspect.

(Testimony of William H. Grady.)

Q. So that no fingerprints were taken from this bag, U. S. Exhibit No. 18, is that your testimony?

A. Yes, that is my testimony.

Q. How about the envelopes?

A. Well, on the envelopes there are several fingerprints. There is quite a number of fingerprints on the envelopes, but they are smudged enough to where they are not legible. We cannot determine who they belong to. We have one we have identified, and we have several unidentified fingerprints, as I understand it.

Q. You have several unidentified?

A. Yes, sir.

Q. What do you mean by that?

A. Fingerprints that can be read and are legible, but we just don't know who they belong to.

Q. You don't know who they belong to. How many of those do you have?

A. I can't say definitely. I think Mr. Green would probably be able to tell you more definitely.

Q. You took those specimens from the envelope, did you not?

A. I developed the prints, developed the latent fingerprints that are on the package, by the use of silver nitrate solution, and after the fingerprints have been developed, any prints that contained enough pattern to be classified are compared and have had [174] photographs taken of those.

Q. How many were developed sufficient enough to be compared?

A. I would estimate that there are four or five.

(Testimony of William H. Grady.)

Q. Four or five. Well, were those processed through the Bureau of Identification in Washington? A. In New York.

Q. In New York? A. Yes.

Q. And you have been unable to identify them?

A. Well, I believe that there are three or four or five that have not been identified definitely, but Mr. Green has handled that and he can tell you about those.

Q. At all events, there are fingerprints of some persons other than these defendants?

A. That is my understanding.

Mr. Dunning: That is all.

Further Redirect Examination

By Mr. Karesh:

Q. Not all of the fingerprints, though, are other than these defendants? A. No.

Q. You say there were smudges on this brown paper sack, and therefore you could not, from the brown smudges, draw a latent fingerprint so that it could be compared with an exemplar; that is what you mean?

A. Exactly. There are fingerprints on there to show that it had [175] been handled, but the fingerprints are not of a quality that they can be read to determine who they belong to. They have been smudged.

Mr. Karesh: That is all.

Mr. Dunning: No further questions.

The Court: That will be all.

EDWARD P. BERTIN

called as a witness on behalf of the Government, and being duly sworn testified as follows:

Direct Examination

By Mr. Karesh:

Q. Mr. Bertin, you are an agent of the Bureau of Narcotics? A. Yes, I am.

Q. You work for the United States Government, is that correct? A. Yes, sir.

Q. You are assigned to the San Francisco office?

A. Yes, sir.

Q. You work under Colonel White?

A. I do.

Q. You work with Agents Cass, Grady, and other agents? A. I do.

Q. How long have you been an agent?

A. Seventeen years.

Q. How long have you been in San Francisco?

A. About eight years.

Q. Were you an agent in October and November of last year? A. Yes, sir.

Q. Calling your attention to October 31, 1948, did you see this Cadillac car with license No. 17-K-120, which is U. S. Exhibit No. 34 For Identification? A. I did.

Q. Where was the car the first time that you saw it?

A. It was parked on Clay Street, right off of Tenth, on the east side of the street facing north.

(Testimony of Edward P. Bertin.)

Q. When you first saw it was anyone in the car?

A. No, sir.

Q. Did you see then someone come in the car?

A. I did.

Q. Who did you see get in the car?

A. The defendant Ballard.

Q. By Ballard, whom do you mean, Mr. Bertin?

A. The man second from Mr. Leeper there.

Mr. Karesh: May the record show the witness has identified the defendant Ballard?

Q. Did Ballard drive away in the car?

A. He did, yes.

Q. Later on did you see this car with the license number 17-K-120 in the vicinity of the Clay-Ten Hotel?

A. Yes, I did. [177]

Q. Where was it?

A. It pulled up just a little beyond the entrance of the Clay-Ten Hotel north and parked.

Q. It came around the corner of Tenth, moved toward Eleventh and parked, is that right?

A. That is right.

Q. Whom did you see in the car?

A. I saw the defendant Ballard——

Q. You have already identified Ballard. Whom else did you see?

A. McDonough.

Q. Which is McDonough?

A. The man next to Ballard.

Mr. Karesh: May the record show the witness has identified the defendant McDonough.

Q. And who else?

(Testimony of Edward P. Bertin.)

A. The defendant Ingoglia sitting next to McDonough.

Mr. Karesh: Let the record show, if your Honor please, the witness has identified the defendant Ingoglia, who was driving the car.

Mr. Dunning: Who was driving the car?

Mr. Karesh: Yes.

Mr. Dunning: Pardon me. I do not believe that is the testimony.

Mr. Karesh: I asked him who was driving the car.

Mr. Deasy: Let the record show "the defendant Ingoglia, who was driving the car." [178]

Mr. Karesh: No, I stopped there. I said, "Who was driving the car?"

A. The defendant Ballard was driving the car.

Q. (By Mr. Karesh): Where was McDonough in the car?

A. He was sitting in the center of the front seat.

Q. Where was Ingoglia?

A. On the right side of the front seat, sitting on the right side.

Q. Who got out of the car?

A. Ingoglia and Ballard.

Q. Who remained in the car?

A. McDonough.

Q. Where did Ingoglia and Ballard go?

A. Went into the Clay-Ten Hotel.

Q. Did the defendant McDonough get into the driver's seat? A. Yes.

(Testimony of Edward P. Bertin.)

Q. How far away from them were you when this happened, when they got out of the car?

A. I was just walking by when the car was parked.

Q. By Eleventh and Clay Street?

A. Yes, going towards Tenth.

Q. Did you have a conversation with the defendant McDonough after October 31, 1948?

A. Yes, I did.

Q. Where did the conversation take place? When and who was [179] present when it took place?

A. On November 15th in the U. S. Marshal's office on the second floor of this building.

Mr. Karesh: If your Honor please, we ask——

The Court: Yes, this conversation will be received as simply and solely against the defendant McDonough. It is not evidence against any of the other defendants.

Q. (By Mr. Karesh): What was the conversation?

A. I was typing the information on the back of the fingerprint card of McDonough's.

Q. Yes.

A. And he made the remark he did not know why they got him into this.

Q. Go ahead.

A. That he didn't know any of these people we arrested except Ballard.

(Testimony of Edward P. Bertin.)

Q. He said he didn't know any of these people you had arrested except Ballard?

A. Ballard.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Dunning:

Q. There was nothing unusual about Mr. Ingoglia getting out of the car, was there?

A. He got out of the car on the right side, the normal way.

Q. You saw no package or any other object upon his person? [180] A. No, I did not.

Q. How long a period of time would you say it was, Mr. Bertin, from the time Mr. Ballard came out of the car, came out of the Clay-Ten Hotel, until the time he returned?

A. Well, I would estimate around twenty minutes or so.

Q. Around twenty minutes or so? A. Yes.

Q. How long a period of time would you say expired from the time Ballard first came out of the Clay-Ten Hotel and was followed by the informer Mallabee?

A. I didn't see the informer follow.

Q. You did not? A. No.

Mr. Karesh: There is no such testimony. Do you mean followed in the sense of pursuit?

Mr. Dunning: I mean come out of the hotel.

The Witness: You mean followed out of the hotel?

(Testimony of Edward P. Bertin.)

Q. (By Mr. Dunning): Followed out of the hotel.

A. About five minutes or maybe a little more.

Cross-Examination

By Mr. Deasy:

Q. You say on the first occasion you saw the Cadillac there was no one in it, is that correct?

A. Yes, sir.

Q. And then you say a gentleman whose name is Ballard came out and got in the car? [181]

A. Yes, sir.

Q. You say his name was Ballard. At the time you saw him coming out of the hotel did you know his name was Ballard? A. No, I did not.

Q. That is the name you subsequently discovered belongs to him? A. That is right.

Q. When was the first occasion you had ever seen Mr. Ballard, as near as you can recall?

A. When he came out of the hotel and got in the Cadillac car.

Q. On October 31, 1948? A. Yes.

Q. And you have been actively in the Bay Area for eight years as a narcotic agent, is that correct?

A. Yes, sir.

Mr. Deasy: That is all. Thank you very much.

Q. (By Mr. Karesh): By the way, how was Mr. Ingoglia dressed?

The Court: Do any of the other counsel for the defendants wish to examine?

(Testimony of Edward P. Bertin.)

Mr. Kernes: No questions, your Honor.

Mr. Karesh: Pardon me, your Honor.

Redirect Examination

By Mr. Karesh:

Q. How was he dressed?

A. May I have that question again?

Q. How was Ingoglia dressed when he came out of the hotel and went into the car on October 31st?

A. He was wearing a chamois tan-colored sport coat with a belt and he had tan slacks and tan sport shirt.

Q. Did you see pictures of Ingoglia before that time?

A. No, I had not.

Mr. Dunning: I will object to that as incompetent.

The Court: The answer is in.

Mr. Karesh: That is all.

LOUIS VINCENT SOUZA

called as a witness on behalf of the Government, and being first duly sworn testified as follows:

Q. (By the Clerk): What is your full name?

A. Louis Vincent Souza.

Direct Examination

By Mr. Karesh:

Q. Mr. Souza, where do you reside?

A. 1135 Seventy-seventh Avenue, Oakland.

Q. How long have you resided there?

A. Since about 1943.

Q. Are you married? A. I am.

(Testimony of Louis Vincent Souza.)

Q. You live with you wife? A. I do.

Q. At the address you just mentioned?

A. I do.

Q. Do you have any children? [183]

A. Not living with me at the home, no.

Q. What is your occupation?

A. Tavern owner.

Q. Where is the tavern?

A. 1218 Franklin, Oakland.

Q. You have a phone? A. I have.

Q. At your home? A. I have.

Q. What is the phone number?

A. Lochaven 9-5281.

Q. Did you have such a phone in your house in September, 1948?

A. Just about that time it went in.

Q. In October you had the phone in?

A. Yes.

Q. Did you have the phone in your house on October 20, 1948? A. I did. [184]

Q. And that is number Lockhaven 9-5281, is that right? A. Yes, sir.

Q. Do you know the defendant McDonough?

A. I do.

Q. Do you recognize him in the courtroom?

A. I do.

Q. Point him out to the Court, please, and jury.

A. The third one to the left.

Mr. Karesh: May the record show, if Your Honor please, that the witness has identified the defendant McDonough.

(Testimony of Louis Vincent Souza.)

Q. How long have you known him?

A. About eleven months.

Q. Calling your attention to September of 1948, did you have a conversation with him about a Cadillac automobile? A. Yes.

Q. Where did the conversation take place?

A. My bar.

Q. What was that? A. At my bar.

Q. Who was present when it took place?

A. Oh, I couldn't say.

Mr. Deasy: I am sorry, I didn't hear you.

A. I couldn't say.

Q. (By Mr. Karesh): Anyone else participating in the conversation about the car, or just yourself and Mr. McDonough? [185]

A. Oh, it was just talking about buying an automobile, I was going to buy a Cadillac.

Mr. Deasy: I don't believe that is responsive.

Q. (By Mr. Karesh): No. I asked you if anyone else was participating in the conversation besides yourself and McDonough, the conversation about the automobile. What is the answer?

A. No.

Q. Just tell us as best you remember it, what the conversation was, about the Cadillac car between yourself and McDonough.

Mr. Dunning: I will object to the question as being outside the presence of Ingoglia and hearsay.

Mr. Deasy: I urge the same objection.

The Court: I will receive it merely as against

(Testimony of Louis Vincent Souza.)

the defendant McDonough who had the conversation, with the understanding that later on the ruling may be expanded to include any defendants related in the conversation if connected up. Go ahead.

Q. (By Mr. Karesh): What was the conversation?

A. Well, it is pretty hard to say, because we were just talking about buying an automobile, a Cadillac, and he just mentioned Leeper had one for sale, and that was all the conversation was. I tried to contact Leeper and I couldn't get him.

Q. By Leeper who do you mean?

A. Right over there.

Q. The man sitting here, the man with the cane?

A. That is the only conversation I had. I didn't even get to [186] talk to him.

Q. Do I understand you had a conversation in September with Mr. McDonough about a Cadillac automobile and he said Leeper had a Cadillac automobile, is that correct, and you tried to get in touch with Leeper?

A. Yes, sir.

Q. Where did you call Leeper from?

A. My bar.

Q. Did you ever have any phone conversation with Mr. Leeper?

A. I did not.

Q. On October 20, 1948 did you have a phone conversation with Mr. Leeper over your home phone?

A. I never did.

Q. Now, tell me, did Mr. McDonough ever visit

(Testimony of Louis Vincent Souza.)

and stay in your home in October 1948?

A. Yes, he used to visit there.

Q. He used to visit there, or did he sleep there on many occasions?

A. He stayed there, but he wasn't living there.

Q. What do you mean by "he stayed there, but he wasn't living there"?

A. Well, a girl friend was living at the house.

Q. In other word, you say he stayed there, he slept there many times, did he not, in October?

A. Yes. [187]

Q. And he had the use of the phone, did he not?

A. Yes, the phone was there in the house. Anybody could use it.

Mr. Karesh: That is all.

Mr. Deasy: No questions for Ballard and Leeper.

Mr. Dunning: No questions as far as Ingoglia is concerned.

Mr. Ehrlich: No questions.

Mr. Kernes: No questions.

Q. (By Mr. Karesh): Could I ask you just one more question: The agents came down to see you about the defendant McDonough, did they not, some time after October 31?

A. Well, I don't know what date it was, they just came in like a bunch of Comanche Indians and arrested me, if that is what you want to know.

Q. They arrested you?

A. They didn't do nothing else.

Q. They took you to jail?

(Testimony of Louis Vincent Souza.)

A. No, they didn't take me to jail, they took me to my house and searched my house.

Q. They were looking for whom?

A. I don't know who they were looking for.

Q. Did they ask you about McDonough and where he was?

A. Yes, they asked me about McDonough.

Q. And they went out there to your house to see if he was there? A. No.

Q. What did they go there for? [188]

A. They just said they wanted to go to the house.

Mr. Deasy: Just a moment. Objected to as calling for an opinion and conclusion.

The Court: Sustained.

Q. (By Mr. Karesh): Anyway, they looked in your house, is that correct? A. Yes.

Q. And Mr. McDonough wasn't there?

A. No. He hadn't been there for three or four days.

Q. When did you see McDonough again after the officers came out to your house?

A. It was after he was released on bail.

Q. Did you have a conversation with him?

A. I did.

Q. You got into an argument, did you?

Mr. Deasy: Just a second. Objected to on the ground that is calling for a conclusion.

The Court: Sustained.

Q. (By Mr. Karesh): You had a discussion with him. What was the discussion?

(Testimony of Louis Vincent Souza.)

Mr. Deasy: Just a moment. On behalf of Ballard and Leeper, I object as hearsay.

The Court: It is received only against the defendant McDonough.

Mr. Dunning: I will object to it as far as the defendant [189] Ingoglia is concerned on the ground it is calling for a conversation after the completion of the so-called conspiracy.

The Court: I am receiving this solely against the defendant McDonough.

Mr. Karesh: We are so offering it.

Q. Go ahead. What was it?

A. Well, I got very angry about the whole situation and I asked him to leave, him and the girl that was staying at my house after he got out on bail, so they packed their clothes and left.

Q. Didn't you discuss the trouble he was in?

A. What is it?

Q. Didn't you discuss the trouble he was in?

A. No, I asked him what was the beef about—in fact, I knew what it was about after the officers told me—so it got one word after another and he thought I put the finger on the girl, and that was it, and I didn't have nothing to do with it at all.

Q. You told him you didn't put the finger on her? A. I did.

Mr. Karesh: That is all.

Mr. Deasy: No questions for Leeper and Ballard.

Mr. Kernes: No questions on behalf of the defendant McDonough.

(Testimony of Louis Vincent Souza.)

Mr. Dunning: No questions on behalf of the defendant Ingoglia.

Mr. Ehrlich: No questions.

The Court: Apparently there are no questions on cross-examination. [190] You may leave.

Mr. Karesh: Mrs. Souza.

MRS. ELIZABETH SOUZA

called for the United States; sworn.

Direct Examination

By Mr. Karesh:

Q. Where do you reside, Mrs. Souza?

A. At 1135 77th Avenue.

Q. In what city? A. In Oakland.

Q. Your husband is? A. Louis Souza.

Q. He is the gentleman who just came in and out of the courtroom? A. Yes, he is.

Q. And do you have a phone at your house?

A. Yes.

Q. Do you know your phone number?

A. It is Lockhaven 9-5281.

Q. How long have you had that phone in your residence?

A. I couldn't say, I don't recall.

Q. It was there in September, September 1948?

A. Yes, I think so.

Q. October 1948? A. Yes.

Q. Calling your attention to October 1948, did

(Testimony of Mrs. Elizabeth Souza.)

you at any time [191] from Lockhaven 9 what is it, 5281? A. Yes.

Q. —have a phone conversation with a man named Raymond Leeper?

A. No, I never have.

Q. You never phoned him and he never phoned you and you never spoke to him on the phone?

A. No.

Q. I call your particular attention to October 20, 1948, you never had any conversation with him over the phone Lockhaven 9-5281 on that day?

A. No.

Q. He never called you? A. No, sir.

Q. Never spoke to you? A. No, sir.

Q. You know, of course, Mr. McDonough, do you not? A. I don't know the name.

Q. You knew him by the name of Red, didn't you? A. Yes.

Q. You know Red. Did Red stay at your house for a while?

A. Well, at times he stayed there.

Q. During October 1948?

A. Well, I think so, he was there at times.

Q. Spent the night there, did he not?

A. Yes. [192]

Q. He had the use of your phone, didn't he?

A. Well, yes.

Q. He used to receive calls there, didn't he?

A. Well, I don't really know, I don't remember. They all used the phone, everybody in the house used the phone.

(Testimony of Mrs. Elizabeth Souza.)

Q. Who was there in the house at that time?

A. My husband and I and one of my girl friends.

Q. ———who lived there, and McDonough?

A. Yes.

Q. That is all that were in the house?

A. Yes.

Mr. Karesh: That is all.

Mr. Kernes: No questions on behalf of the defendant McDonough.

Mr. Deasy: No questions on behalf of Ballard and Leeper.

Mr. Dunning: No questions.

Mr. Ehrlich: No questions.

The Court: That is all.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.)

Afternoon Session

Wednesday, June 8, 1949, 2:00 o'Clock

Mr. Karesh: Call Mrs. LaFevar.

GENEVA LaFEVAR

called for the United States; sworn.

Q. (By the Clerk): What is your name, please?

A. Geneva LaFevar.

Direct Examination

By Mr. Karesh:

Q. What did you say your name was, please?

A. Geneva LaFevar.

(Testimony of Geneva LaFevar.)

Q. Are you Miss or Mrs.? A. Mrs.

Mr. Dunning: I didn't get that answer.

Mr. Deasy: Will you speak up louder?

Mr. Dunning: Will you read the last answer, Mr. Reporter?

(Record read.)

Q. (By Mr. Karesh): Are you living with your husband or divorced? A. Divorced.

Mr. Dunning: I didn't get that last answer. May I have that again?

The Court: Now, can't you speak up a little louder? Not even the Reporter can hear you. These gentlemen down here and everybody have to hear you.

Mr. Deasy: May I have that last answer read?

The Clerk: She said she was divorced. [194]

Q. (By Mr. Karesh): Did you live in Oakland in 1948? A. I did.

Q. And when did you first come to live in Oakland? A. In February 1948.

The Court: Can't you speak louder?

A. I am sorry.

Mr. Dunning: May I have the last answer read?

The Court: February 1948 was the answer.

Q. (By Mr. Karesh): And did you have a job in Oakland? A. Yes, I had one.

Q. And what job did you have?

A. Cashier at the Mayflower Restaurant and I worked at various restaurants.

Q. And where did you come from? Where is your home? A. Ohio.

(Testimony of Geneva LaFevar.)

Q. What city in Ohio? A. Akron.

Q. Now, do you know a man by the name of Ingoglia? A. I do.

Q. Do you know his full name?

A. Andrew Ingoglia.

Q. Do you know him by any other name?

A. Andy Bruno.

Q. What was that? I couldn't hear you.

A. Andy Bruno. [195]

Q. And how long have you known Mr. Ingoglia or Mr. Bruno? A. Since September 1948.

Q. (By the Court): September of what year?

A. September of 1948.

Q. (By Mr. Karesh): And how did you happen to meet Mr. Ingoglia?

A. Well, I was working in barbershop and I met him through a friend of mine, a manager.

Mr. Deasy: I am sorry, I didn't hear that. May I have that answer read?

The Court: She said she was working in a barbershop and she met him through a friend.

A. —that was working in the barbershop.

Q. (By Mr. Karesh): What barbershop was that? A. Harry Bank on Franklin Street.

Q. Is that in Oakland, Mrs. LaFevar?

A. Yes.

Q. Now, the man you say you met, Mr. Ingoglia, do you recognize him in the courtroom?

A. Yes.

Q. I couldn't hear you, I am sorry.

(Testimony of Geneva LaFevar.)

A. Yes.

Q. And will you point Ingoglia out to the Court and the members of the jury?

A. He is the fourth person sitting to my right.

Q. This gentleman here with his hand on his face? [196]

A. Yes.

Mr. Karesh: May the record show, Your Honor, that the witness has identified the defendant Andy Ingoglia also known as Andy Bruno.

Q. Did you start keeping company with Mr. Ingoglia after you met him in September 1948?

A. Yes.

Q. And where did you live at that time?

A. At the Travelers Hotel.

Q. And where is the Travelers Hotel?

A. In Oakland?

Q. And do you know where Mr. Ingoglia lived when you met him?

A. When I met him he was living at the St. Marks and then later he moved to the Lakeside Hotel.

Q. I didn't hear that.

A. When I met him he was living at the St. Marks Hotel——

Mr. Dunning: St. Marks?

A. ——and later he moved to the Lakeside Hotel.

Q. (By Mr. Karesh): Both those hotels in Oakland?

A. Yes.

Q. After September, after you met Mr. Ingoglia

(Testimony of Geneva LaFevar.)

in September of 1948, did you keep steady company with him? A. Yes.

Q. Did he visit you in your apartment?

A. Yes. [197]

Q. More than one occasion? A. Yes.

Q. Would you say often? A. No.

Q. How many times would you say you visited him a week?

A. I saw him practically every day.

Q. And did you stay late in his apartment?

A. Yes.

Q. Did he come and visit you in your apartment?

A. On various occasions.

Q. What is that? A. Various occasions.

Q. In other words, you visited each other in your respective places where both of you were staying, is that correct? A. Yes.

Q. Did you drive an automobile at that time?

A. Yes.

Q. Whose automobile was it that you were driving? A. Mr. Ingoglia's.

Q. Mr. who? A. Mr. Ingoglia's.

Q. Did you ever go out and purchase some milk sugar for anyone during 1948? A. Yes.

Q. Do you recall about when it was in 1948 that you purchased [198] some milk sugar?

A. The latter part of November or the first of December.

Q. Where did you purchase it?

Mr. Dunning: Just a moment. I didn't hear the answer, Your Honor.

(Testimony of Geneva LaFevar.)

The Court: The latter part of November or the first part of December.

Q. (By Mr. Karesh): Where did you purchase the milk sugar from?

A. A drugstore in Berkeley.

Mr. Dunning: Just a moment. I am going to object to that as calling for evidence that transpired after the completion of this crime, a date in November or December. The crime is alleged to have been committed on October 31, 1948.

The Court: I fail to see the materiality.

Mr. Karesh: I think, Your Honor, it has to do with the pattern or type of crime here. The chemist has specified that in the narcotics that he examined there was a reduced sugar, and milk sugar is a reduced sugar.

Mr. Dunning: I contend, Your Honor, it is remote and outside the issues of this case. It apparently concerns itself with a transaction that has nothing to do with the charge in the indictment.

The Court: It is too speculative. Sustained.

Q. (By Mr. Karesh): Did you have a conversation with Mr. Ingoglia about narcotics? [199]

Mr. Dunning: Just a moment. I will ask that the time and place be fixed.

The Court: Yes.

Mr. Karesh: I am about to fix it.

Q. Did you have a conversation with him?

A. Yes.

Q. About when did the conversation take place?

(Testimony of Geneva LaFevor.)

A. Well, about the same time, just a few days prior to the time that I bought the milk sugar.

Mr. Deasy: Could we have the latter part of the answer read? I didn't hear it.

The Court: "About the same time, a few days before I bought the milk sugar."

Mr. Deasy: Thank you.

Q. (By Mr. Karesh): Would you say that was in November of 1948? A. Yes.

Q. Can you fix that in relation to the time that Mr. Ingoglia was arrested on this narcotic charge?

Mr. Dunning: I will object to that as calling for a conclusion and opinion of the witness. The indictment specifies the date of the arrest—

The Court: Well, it assumes something not in evidence that she knew when he was arrested.

Q. (By Mr. Karesh): I will withdraw the question and ask you do you know when he was arrested? [200] A. Yes.

Q. Yes? A. Yes.

Q. Did he talk to you, Mr. Ingoglia, about his arrest? A. After his arrest, yes.

Q. How long after his arrest did he talk to you?

Mr. Dunning: Now, I am going to object to any conversation had after the arrest of this defendant.

The Court: Yes, any conversation, any testimony concerning a conversation this witness had with Ingoglia is received solely and exclusively as against the defendant Ingoglia and is not evidence against any of the other defendants in the case.

(Testimony of Geneva LaFevar.)

Mr. Dunning: I am objecting further, Your Honor, on the ground that it is calling for a conversation outside the issues of this case, remote and at a time when the——

The Court: I don't know what the conversation is about. It may bear directly on this case.

Mr. Dunning: However, the time has been fixed as of November or December, a time after the completion of the alleged conspiracy and the offense alleged in the indictment. Upon that ground I ask that the conversation go out.

Mr. Karesh: I thought she said——

The Court: Mr. Dunning, if there is an admission made by this defendant that she is going to relate, that certainly would be pertinent whether made after the consummation of the alleged [201] offenses. Proceed.

Q. (By Mr. Karesh): How long after the arrest would you say this conversation took place?

A. About two weeks.

Q. Where was it the conversation took place?

A. Mr. Ingoglia had contacted me approximately two weeks after he had been released from prison and that is when it took place.

Q. You mean he had been released on bail on this charge? That is what you mean, don't you?

A. Yes.

Q. Where were you and where was he when the conversation took place?

A. In various places.

(Testimony of Geneva LaFevar.)

Q. No, I mean one particular conversation in which he discussed his arrest with you. You say such a conversation took place. Where were the two of you when it took place?

A. Well, when we were driving around in the car and when I first met him it had been brought up.

Q. Now, you say when you first met him after his arrest you say the conversation was brought up about the arrest. You say you think you were driving in your automobile or in the automobile. Anyone else in the automobile, Mrs. LaFevar, when this took place? A. No. [202]

Q. All right. Now tell the jury as best you can remember, and the Court, just what was said.

A. Well,—

The Court: Speak up, please, so we can all hear you.

A. When he contacted me the first thing, naturally, was the case, was brought up, so I asked him a few questions and he told he, he says, well, he says, the law didn't catch him with anything, but he was going to beat the rap. That is all.

Q. (By Mr. Karesh): Now didn't he say something to you, Mrs. LaFevar, other than that? Wasn't there anything else said?

A. At that previous time I don't think so. I don't remember.

The Court: Speak up. What is it?

A. I can't remember right now; I can't recall right now.

(Testimony of Geneva LaFevar.)

Q. (By Mr. Karesh): Well, wasn't there some conversation about your——

Mr. Dunning: Just a moment. I am going to object to this as leading and suggestive and an apparent attempt on the part of the prosecutor to coach the witness.

Mr. Karesh: I am not coaching the witness.

Mr. Dunning: Objected to as leading and suggestive, Your Honor.

Q. (By Mr. Karesh): I asked you——

A. He has told me——

Q. Go ahead; what did you say?

A. He has told me that more than once. [203]

Q. (By the Court): He told you what?

Q. (By Mr. Karesh): Told you what?

A. That he was going to beat this case.

Q. (By the Court): Was there anything else he told you about this case?

A. Yes, he was also in the narcotic traffic.

Mr. Kernes: Would the Reporter repeat that last portion of the answer?

The Court: "Also he said he was in the narcotic traffic."

Q. (By Mr. Karesh): Did you ever ask him where the narcotics came from?

A. He has told me.

Q. What did he tell you?

A. They came from New York.

Mr. Dunning: Just a moment. I object. The time and place of the conversation——

(Testimony of Geneva LaFevar.)

Mr. Karesh: Yes, I am sorry.

The Court: Yes.

Q. (By Mr. Karesh): Where and when did the conversation take place about the narcotics coming from New York?

A. When he lived at the 55th Avenue Motel.

Q. About what time was that?

A. This was just a few weeks before Christmas.

Mr. Dunning: Pardon me, I didn't hear that.

The Court: "Just a few weeks before Christmas." [204]

Q. (By Mr. Karesh): What did he say about the narcotics from New York?

A. Well, he said someone's bringing some narcotics in from New York.

Mr. Dunning: Just a moment. I am going to ask this go out as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Motion denied.

Mr. Deasy: Your Honor's ruling in connection with this testimony too is it is admissible only as to——

The Court: I so explained it to the jury. It is admissible solely against the one defendant Ingoglia.

Q. (By Mr. Karesh): Did you ever see Mr. Ingoglia at any time with any narcotics in his possession? A. Yes.

Mr. Dunning: Just a moment. I ask the time and place be fixed.

The Court: Yes.

(Testimony of Geneva LaFevar.)

Q. (By Mr. Karesh): You say your answer is yes. Will you fix the time and who was present?

A. The person who brought it in from New York, Mr. Ingoglia and myself.

Q. The who?

A. The person who brought it in from New York, Mr. Ingoglia and myself. [205]

Q. And what was said at that time?

The Court: First, do you know who the person was from New York?

The Witness: Yes, I do.

Q. (By Mr. Karesh): What was his name?

A. Tony Sapoli.

Q. Tony who?

A. I think it is pronounced Sapoli.

Q. Now, do you recall the date? Was that before Christmas? A. Yes.

Q. Was this before you were in the hospital?

A. Yes.

Mr. Dunning: Just a moment. That doesn't fix the time. May I have the time and place fixed for the conversation?

The Court: Can you place more definitely the date?

The Witness: I couldn't tell you the exact date. All I can say is it was the latter part of November or the first part of December.

Q. And where was the conversation had?

A. 55th Avenue Motel.

The Court: Proceed.

(Testimony of Geneva LaFevar.)

Q. (By Mr. Karesh): Who did you say was present?

A. Mr. Ingoglia, Tony Sapoli and myself.

Q. You saw the narcotics there?

A. I did.

Q. Did Mr. Ingoglia tell you they were narcotics? [206]

A. Yes.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Dunning:

Q. You say, Mrs. LaFevar, that you are married but divorced, is that correct?

A. Yes.

Q. Where did you say you came from before coming to California?

A. I lived in New York.

Q. New York. And you arrived here some time in Oakland in September of 1948, is that correct?

A. No, I arrived here in February 1948.

Q. In February 1948. Who did you come from New York with?

A. I came by myself.

Q. You came by yourself. Did you reside at the St. Marks Hotel in Oakland?

A. Yes.

Q. With whom did you reside there?

A. By myself.

Q. By yourself?

A. Yes.

Q. You weren't registered at the St. Marks Hotel with any other persons?

A. No.

Q. Now, you say you met Mr. Ingoglia in September of 1948, is that correct? [207]

A. Yes.

(Testimony of Geneva LaFevar.)

Q. Did I understand your testimony you met him in a barber shop in Oakland? A. Yes.

Q. Were you working there at the time?

A. Not that particular barber shop, but I was working in a barber shop, yes.

Q. I didn't quite understand you.

A. I wasn't working in the particular barber shop that I met him in, but I was working in a barber shop.

Q. I see. What barber shop were you working in? A. On 15th Street.

Q. On 15th Street in Oakland. And how long had you been employed in that barber shop?

A. Not long, because I had just received my manicuring license.

Q. You are a manicurist, are you?

A. Yes.

Q. When did you first go to work in that barber shop?

A. Just a few weeks before I met Mr. Ingoglia.

Q. That would be in September of 1948, is that correct? A. Yes.

Q. And what did you do, what was your employment from February 1948 up until the time you went to work in the barber shop?

A. I had not worked.

Q. You had not worked? [208] A. No.

Q. You had no other means of income during that period of time?

A. I worked before I came here and saved my money.

(Testimony of Geneva LaFevar.)

Q. You had saved a sufficient amount of money to sustain you during that period of time?

A. That is correct.

Q. That is correct. You lived alone at the St. Marks Hotel? A. Yes.

Q. Now, after you left Mr. Ingoglia you say you moved to the Travelers Hotel? A. Yes.

Q. Is that correct? A. Yes.

Q. And how long had you known Mr. Ingoglia before you moved from the St. Marks Hotel to the Travelers Hotel?

A. Approximately two weeks.

Q. Approximately two weeks?

A. Two or three weeks, yes.

Q. Two or three weeks. After knowing Mr. Ingoglia for approximately two or three weeks, you then moved to the Travelers Hotel, is that correct?

A. Yes.

Q. And who did you reside there with?

A. Myself.

Q. Did you ever register there with anyone else?

A. No, sir.

Q. You did not? A. No.

Q. What room did you reside in at the Travelers Hotel? A. I can't remember right now.

Q. You don't recall. Was Mr. Ingoglia registered there at the hotel at that time? A. Yes.

Q. He was. And do you know what room Mr. Ingoglia was registered in? A. No.

Q. You don't know. You testified that you kept steady company with Mr. Ingoglia?

(Testimony of Geneva LaFevar.)

A. For a long period of time off and on from the time I met him until I entered the hospital.

Q. Until the time you entered the hospital. Well, that would be over how many weeks or months?

A. That would be from September——

Q. Do you recall when you went in the hospital?

A. ——until January.

Q. Until January of this year, 1949, is that correct? A. Yes.

Q. Where were you residing at the Travelers Hotel in Oakland? You testified that Mr. Ingoglia visited your room and you exchanged visits to his, is that your testimony? [210]

A. The only time at the Travelers was only a matter of a few days.

Q. He was only——

A. The time we lived at the Travelers Hotel was only a matter of a few days.

Q. I see. How long did you live there?

A. I don't remember.

Q. Can you recall the approximate number of days? A. No, I can't.

Q. Was that more than week or less than a week? A. I really can't recall.

Q. You don't know, is that your answer?

A. Yes.

Q. Where did you move to after you left the Travelers Hotel? A. To Emeryville.

Q. You reside there alone or with someone else?

A. Alone.

(Testimony of Geneva LaFevan.)

Q. Were you working all this period of time?

A. Yes.

Q. Now, you and Mr. Ingoglia, I take it, had somewhat of a love affair together, is that correct?

A. Love affair?

Q. Yes. A. I wouldn't say that.

Q. Pardon? [211] A. No.

Q. You had no affair at all with Mr. Ingoglia?

A. We were together, yes.

Q. Were you intimate together?

A. We never loved each other.

Q. You never lived together? You were intimate together, were you not?

A. I don't see where that has anything to do with this case at all.

The Court: You answer it.

The Witness: I am sorry.

Q. (By Mr. Dunning): Your answer is no, is that your answer? A. No.

The Court: What is your answer? You were asked if you were intimate with him.

The Witness: Yes.

Q. (By Mr. Dunning): Now, the first time it ever came to your attention that Mr. Ingoglia was involved in any sort of an affair involving narcotics is when you read it in the newspapers, is that correct? A. Yes.

Q. That was on October—November 1st or 2nd of 1948? A. I don't recall the dates.

Q. You don't recall the date? A. No. [212]

(Testimony of Geneva LaFevar.)

Q. Now you and Mr. Ingoglia on or about that time or some time in the early part of November no longer continued your close friendship together, did you? I mean, you didn't see each other very often? A. Would you repeat that, please?

Q. I say, after the beginning or first of November you and Mr. Ingoglia had not seen each other very often. A. You mean before his arrest?

Q. Well, when did you stop seeing Mr. Ingoglia?

A. When he was arrested.

Q. When he was arrested? A. Yes.

Q. Well, after he was arrested, then, I understand, you never saw him any more, is that correct?

A. Two weeks after he was released I saw him.

Q. You saw him two weeks after he was arrested? A. Yes.

Q. And up until that time neither you nor Mr. Ingoglia ever had any conversations involving this particular case, had you? A. No.

Q. Mr. Ingoglia has never discussed this particular case with you, has he?

A. Yes, he has.

Q. As I understand it from your testimony, he said that while he was arrested that they had nothing on him and that he did not [213] expect to be convicted?

A. That is what he said first, yes.

Q. That is what he said. In other words, he indicated to you that he wasn't guilty of the offense he was charged with, isn't that correct?

A. At first, yes.

(Testimony of Geneva LaFevrar.)

Q. Yes. And that was the entire extent of his conversation with you insofar as this case is concerned Isn't that all that Mr. Ingoglia has ever said to you when you asked him anything about this case? A. No.

Q. He did not? A. No.

Q. You and Mr. Ingoglia had some personal feeling over your acquaintanceship, did you not?

A. I don't know what you mean.

The Court: Well, did you have any difficulty with him? Have you any feeling of ill will toward him?

The Witness: No.

Q. (By Mr. Dunning): Well, you called him up on New Year's Eve of 1948 and asked to see him, didn't you? A. No.

Q. And didn't Mr. Ingoglia tell you he didn't want to be serious with you any more?

A. No. [214]

Q. Isn't that correct? A. No.

Q. Didn't you make overtures on several occasions that you wanted to continue your company and your relationship with Mr. Ingoglia and he told you that he didn't desire to continue it any further?

A. No, sir.

Q. He did not?

A. No, sir. That is not true.

Mr. Karesh: What was that last answer?

The Court: She said, "That is not true."

The Witness: It is not true.

(Testimony of Geneva LaFevar.)

Q. (By Mr. Dunning): Now, he never at any time told you that he delivered a package that is involved in this case to Mr. Ray Leeper, did he?

A. From the time that I saw him, he was supposed to have left town, before he was arrested he was supposed to have left town.

Mr. Dunning: Just a moment. I ask that go out as not responsive.

The Court: It will go out. You were asked about the conversation that you had with him about that.

The Witness: That is what I was leading to.

The Court: Well, did you have a conversation with him about the delivery of a package?

The Witness: Yes. [215]

Q. —to Mr. Leeper. When and where did you have that conversation?

A. This was while he was living in the 55th Street Motel.

Q. Can you fix that approximately?

A. You mean the date.

Q. Yes, the month.

A. It would have to be in November.

Q. In November. And who were present?

A. Just myself.

Q. With him? A. Yes.

Q. What did he say?

A. Oh, he was explaining how Mr. White walked into the room and the three of them—two of them were in there, and I can't recall just exactly how it happened, but he did explain it to me.

(Testimony of Geneva LaFevar.)

Q. Can't you go into detail and tell us more fully what you recall of what he said at that time?

A. No, but it was brought up, but I can't—

Q. Did he say anything about a package being delivered to the room? A. Yes.

Q. Tell us what he said about that.

A. Well, I told you I don't have it fixed in my mind because I really didn't pay too much attention.

Q. Well, your best recollection of what he said about the [216] package.

A. Well, he just explained how the agents caught them with the narcotics.

Q. How the agents caught who? Who do you mean? A. Caught them.

Q. Caught them? A. Yes.

Q. And did he explain to you how the agents caught them?

A. It was brought up, but I really don't remember just exactly how—right now I can't recall just exactly.

Q. Did he tell you who had gone to the Leeper apartment?

A. From my recollection, he was there also.

Q. Who? A. Mr. Ingoglia.

Q. Anybody besides Mr. Ingoglia?

A. No, I don't know.

Q. Did he tell you who brought the package to the room? A. No.

Q. Didn't he say anything about the package? (Testimony of Geneva LaFevar.)

A. He said, but I don't remember, I really don't remember just exactly, there are so many things I just can't recall everything, but I do recall that it was discussed.

Q. (By Mr. Dunning): Well, as a matter of fact, Mrs. LaFevar, you read in the newspapers that Mr. Ingoglia was accused of delivering a package in this case, isn't that correct? [217]

A. Yes.

Q. Now, when was it that this party you refer to as Mr. Sapoli or Saboli, whatever his name is, when was he here in Oakland?

A. The first time? Well, he was about—I would say about three weeks before Christmas.

Q. Three weeks before Christmas?

A. I would say about three weeks. I wouldn't know exactly.

Q. Three weeks before Christmas, that would be some time in the early part of December or the latter part of November, is that correct? Is that correct? A. Yes.

Q. So that that individual whom you refer to as Sapoli did not—was not mentioned or known by you until some time after October 31?

A. That is right.

Q. That is correct. Now, when you say you kept steady company with Mr. Ingoglia, what do you mean by that? A. I was with him every day.

Q. You were with him every day? You mean by that that you lived with him also?

(Testimony of Geneva LaFevar.)

A. No, I don't.

Q. Pardon? A. No, I don't.

Q. You don't mean that? A. No, I don't.

Q. You mean to say that you didn't live with Mr. Ingoglia? A. No, I didn't.

Q. Did you live with anyone else at the St. Marks Hotel when you came to New York?

Mr. Karesh: I object to that as incompetent, irrelevant and immaterial as to whether she lived with anyone else.

The Court: Sustained.

Q. (By Mr. Dunning): Now, you referred to a conversation in Mr. Ingoglia's automobile. Do you recall just testifying to that? A. Yes.

Q. You do. Now, you said that you think that it was in the automobile. Do I understand you again that you are not sure or certain that a conversation took place in the automobile?

A. The conversation took place when I met him that day. Whether we were in the automobile or otherwise, it took place.

Q. What day was that?

A. It was two weeks, approximately two weeks after his arrest.

Q. Two weeks after he was arrested?

A. I mean, after he was released.

Q. After he was released, is that correct?

A. Yes.

Q. But you couldn't say for certain whether it was in the automobile or some other place, is that correct?

(Testimony of Geneva LaFevar.)

A. No, but I am certain it was in the automobile. [219]

Q. And the most Mr. Ingoglia told you at that time, that he was arrested but that they didn't get anything on him and he expected to be acquitted. Didn't the conversation amount to that?

A. He also said they were fully of boloney.

Q. Were those his exact words? A. Yes.

The Court: You said in your direct examination he made the statement that he would beat the rap. Now, did he say that or not?

The Witness: He did.

Q. (By Mr. Dunning): When did you first speak to the agents in charge of this case, Mrs. LaFevar? A. February of 1949.

Q. February of 1949, is that correct?

A. Yes. It could have been January.

Q. January 1949?

A. The latter part of January or the first part of February, I don't know.

Q. And you made no effort at any time before then to contact any of the agents or speak to them, did you, about this case? A. Yes, I did.

Q. About this case or about some other matter?

A. About Mr. Ingoglia himself.

The Court: About what? [220]

The Witness: About Mr. Ingoglia.

Q. (By Mr. Dunning): That was in 1949. Who did you speak to then?

A. That was in 1948 I wrote a letter.

(Testimony of Geneva LaFevan.)

Q. Pardon? A. In 1948 I wrote a letter.

Q. You wrote a letter? A. Yes.

Q. Now, isn't it a fact that for some time after January 1949 that you tried to contact Mr. Ingoglia and he told you he didn't care to continue his company with you any further?

A. No, that is not true.

Q. He did not.

Mr. Dunning: I have no further questions.

Mr. Deasy: I have no questions.

Mr. Kernes: No questions, Your Honor.

Redirect Examination

By Mr. Karesh:

Q. In response to a question by counsel, you said you wrote a letter, is that correct?

A. Yes.

Q. About Mr. Ingoglia? A. Yes.

Q. Did you call him Ingoglia in that letter or Bruno? A. I think it was Bruno.

Q. Do you recall when you wrote the letter?

A. Yes, it was before Christmas.

Q. Could it have been after Christmas?

A. Yes, it could have been.

Q. Did you sign your name to that letter?

A. No.

(Mr. Karesh exhibited the letter to counsel.)

Q. This is the letter you wrote to the FBI?

Mr. Dunning: I am going to object to the letter, Your Honor, as incompetent, irrelevant and

(Testimony of Geneva LaFevar.)

immaterial, and on the further ground it concerns itself with matters that are not pertinent to the issues in this case.

The Court: The objection is sustained.

Mr. Karesh: Is the objection sustained to any questions about the letter or of the admissibility?

The Court: The admissibility.

Q. (By Mr. Karesh): Why did you write the letter?

Mr. Dunning: Objected to on the same ground.

The Court: Sustained.

Mr. Karesh: There was some question raised by counsel, Your Honor——

The Court: It is immaterial, Mr. Karesh, I have ruled.

Q. (By Mr. Karesh): Did you complain—did you talk to the narcotics authorities because Mr. Ingoglia or Mr. Bruno had broken up with you, no longer in love with you, or something like that?

A. No.

Q. What is that? A. No.

Q. You tried to kill yourself in the hospital and went to the hospital, didn't you? A. Yes.

Q. The answer is yes. That was after this arrest of Mr. Ingoglia? That is right, isn't it?

A. Yes.

Recross-Examination

By Mr. Dunning:

Q. Now, Mrs. LaFevar, what was the reason for you attempting to take your life?

(Testimony of Geneva LaFevar.)

A. I was messed up in a lot of things that I didn't care to be.

Q. Now, was it because you and Mr. Ingoglia had separated your friendship? Was that the reason? A. He was with me at that time.

Q. How were you registered at the St. Marks Hotel? A. As Miss LaFevar.

Q. How did you register at the Travelers Hotel?

A. Mrs. Bruno.

Q. How was Mr. Ingoglia registered?

A. As Mr. Bruno.

Mr. Dunning: I believe that is all.

Mr. Karesh: That is all.

Mr. Kernes: No questions. [223]

Mr. Deasy: No questions.

The Court: That will be all.

Mr. Karesh: Mr. McGuire.

THOMAS E. McGUIRE

called for the United States; sworn.

Direct Examination

By Mr. Karesh:

Q. Mr. McGuire, you are a special agent of the Bureau of Narcotics? A. Yes, sir, I am.

Q. And you are assigned to the San Francisco office? A. I am.

Q. And Col. White who sits behind me is your District Supervisor, is that correct?

A. That is correct.

Q. You work under his direction?

A. That is true.

(Testimony of Thomas E. McGuire.)

Q. Do you know James Ballard who sits in the courtroom here? A. Yes, sir, I do.

Q. Will you point him out to the members of the jury and the Court, please?

A. Yes, sir, he is sitting next to Mr. Leeper, the second man inside.

Mr. Karesh: May the record show, Your Honor, that the witness has identified the defendant Ballard. [224]

Q. Did you see the defendant Ballard in the Post Office Building, this building, in November of 1948? A. Yes, sir, I did.

Q. Did you see him in the office of the United States Attorney?

A. He was taken over in the custody of the United States Marshal, Deputy Marshal.

Q. And do you know to what room he came?

A. He came to your office.

Q. Do you know the number? It is 437 in this building.

A. I know it is within the suite of the District Attorney's office. I have been in it a great number of times, but it is in your office.

Q. My name is on it?

A. Your name is on it, yes.

Q. One of the names of many of the Assistants—lots of the Assistants have names on their doors. Do you remember the conversation that took place in that room—what day was it?

(Testimony of Thomas E. McGuire.)

A. It was on a Wednesday, November the 3rd of 1948.

Q. All right. Tell us the conversation that took place.

Mr. Dunning: Just a moment, Mr. McGuire, before you answer that question. I am going to object to any conversation between Mr. Ballard and Mr. McGuire outside of the presence of the defendant Ingoglia as hearsay and not binding.

The Court: The testimony of this witness may give us any conversation which he had with the defendant Ballard or any [225] conversation he had overheard in which Mr. Ballard engaged, will be received solely against the defendant Ballard and is not received against any of the other defendants in the case.

Mr. Deasy: Will you ask who was present, Mr. Karesh?

Q. (By Mr. Karesh): Who was present?

A. Mr. Karesh, the Assistant District Attorney, the defendant Ballard, and to the best of my knowledge and recollection, I believe Mr. Eagan, the United States Deputy Marshal, was in and out of the room. Whether he remained throughout the conversation I can't say.

Q. Well, now, relate the conversation.

A. The defendant was taken before Mr. Karesh by the Deputy United States Marshal Eagan, at which time Mr. Karesh introduced himself or at least I indicated to Ballard, I said, "This is Mr. Karesh, the Assistant United States Attorney that

(Testimony of Thomas E. McGuire.)

is handling the prosecution of narcotic cases," and Mr. Karesh said, "Do you know why you are here, Mr. Ballard?"

Ballard replied, "Well, I have been arrested."

Mr. Karesh said, "That is very true, and you are being transferred to the City Jail here pending your release upon bail. Have you got an attorney?"

Mr. Ballard said at that time, "I am not sure whether I will get one or I need one or that some friends of mine might try to get one for me. I don't know whether I need an attorney."

Mr. Karesh said, "Well, you do, I think that you do need an [226] attorney, and I will explain to you, you know why you are being charged, why you are brought to this building."

He said, "Well, I got pinched, but I don't know the full details."

So Mr. Karesh said to him, "Well, you were charged with other defendants being engaged in narcotic traffic."

Ballard said, "Well, suppose I am not guilty."

So Mr. Karesh said, "That is something for the Court to decide. However, if you wish to make any statement or state any of the facts concerning your activities in the narcotic traffic I will be willing to listen and I would like to hear the full story."

So at that time Ballard—and then I interposed and I said, "Mr. Karesh, I don't know whether

(Testimony of Thomas E. McGuire.)

you are familiar with the fact that Mr. Ballard has told me within a day or two that he met another defendant by the name of McDonough, who is not in the office at this time, and McDonough and Ballard met at the race track in Oakland, at which time McDonough said to Ballard that he had a man that had some narcotics, at which time McDonough introduced Ballard to Ingoglia and there was a general conversation among them at that time if they could find somebody to dispose of the narcotics.”

I was telling this to Mr. Karesh to bring him up to date with the general information.

The Court: This was in the presence of Ballard? [227]

A. In the presence of Ballard.

Mr. Karesh said, “Is that true, Ballard?”

And Ballard said, “Yes, I met this fellow a couple of days at the race track and I knew that he had some stuff and that he wanted to get rid of it, but what do I get out of it if I tell you the story?”

Ballard was told by Mr. Karesh that at this time there was nothing that he could get out of it, and what did he mean. So he said, “Well, will you dismiss the case?” And Mr. Karesh said, “I can’t dismiss the case against you. As you stand, you are going to be indicted. The facts will all have to come out in court, but what we were trying to find out is what you know about the transaction.”

(Testimony of Thomas E. McGuire.)

And then Mr. Karesh got up from his desk and went to the connecting door between his office and an adjoining office and he said, "As a matter of fact, you are being charged with standing outside of a door in this manner at a time in which a large package with a large amount of narcotics was passed through the door to the district supervisor, Mr. White." [228]

He said, "Now in this manner," and he indicated to Mr. Ballard the manner in which he had been told that the narcotics had been taken through this door.

So Ballard then—he said, "That is the condition. You were standing outside of the door and we know it, we can prove it. Now, do you want to tell us the facts of it, or what? Do you say that you don't know anything about it, that you could be standing outside that door when that package was passed through the door without knowing anything about it?"

Ballard shrugged his shoulders and said "It does sound ridiculous, but what do I get out of it? Will you dismiss this case against me now if I tell you the full story?"

And Mr. Karesh replied that he couldn't do so, and he wouldn't do so, and in all probability he would be indicted within a short while. At that time Ballard said, "Well, if that is the case let me get the hell out of here, I am going to have nothing further to say." So he stood by and asked

(Testimony of Thomas E. McGuire.)

to be returned to the Marshal's custody, which was done at that time.

Mr. Karesh: That is all.

Cross-Examination

By Mr. Deasy:

Q. Mr. McGuire, did you make any notes of the conversation that took place?

A. At the time that they were made?

Q. Yes. [229] A. No, sir, I didn't.

Q. Did you make any notes of the conversation at any subsequent time? A. No, I didn't.

Q. And the date of this conversation was in November, is that correct? A. Yes, sir.

Q. And since that time have you been engaged in the work of law enforcement in the narcotics division? A. Yes, sir, I have.

Q. And unquestionably talked to countless people in regard to cases since that time?

A. That is correct, sir.

Q. And you are testifying now completely from memory, is that correct?

A. Yes, sir, I am. [230]

Q. And this conversation took place approximately November 3, 1948?

A. That is correct.

Q. Now, at any time during this conversation did Mr. Karesh go out of the office and come back with some papers?

A. I don't recall any such incident.

(Testimony of Thomas E. McGuire.)

Q. During this time and during this conversation do you recall anything being said about probation?

A. I do not recall any conversation about probation.

Q. Would you say there was nothing said about probation?

A. No, I wouldn't say there was anything said—you mean relating to Ballard's probation, whether he was—You are confining yourself to the conversation between Ballard and myself and Mr. Karesh?

Q. I am confining myself, Mr. McGuire, to the conversation that you have testified to on November 3, 1948, in the office of Mr. Karesh, the United States Attorney.

A. Yes, sir.

Q. All right.

A. There was no conversation relative to probation. With regard to Ballard?

Q. That is what I am talking about.

A. No, there was not, not that I can recall.

Q. Was there any conversation in regard to probation between Mr. Karesh and Mr. Ballard in connection with another defendant [231] who had received probation?

A. I recall no conversation to that effect.

Q. Would you say there was no such conversation?

A. I will not say whether there were or were not. I don't recall it, Counsellor.

Q. Isn't this the fact of the matter, that Mr.

(Testimony of Thomas E. McGuire.)

Karesh said that if Mr. Ballard would become a Government witness, that he would make an effort to get the probation? Isn't that the fact of the matter?

A. I recall nothing said by Mr. Karesh relative to probation, because, if my memory serves me correctly, Counsellor—and I am testifying under oath, here—I would say that that conversation did not take place, because Ballard asked for a dismissal. There was no conversation relative to him coming into court. He asked would this case be dismissed against him. There was nothing said about probation.

Q. There was nothing said about probation?

A. Not that I can recall.

Q. Was there anything said about what would happen if Mr. Ballard stated that he saw Mr. Ingoglia pass a package through the door?

A. Was there anything said about that? Mr. Karesh had related what had taken place, and what information he had about it. I don't understand your questioning. Mr. Karesh did discuss that phase of the investigation. [232]

Q. What did Mr. Karesh say about Mr. Ingoglia passing a package through the door?

A. He explained and showed to the defendant Ballard——

Q. What did he say?

A. That is what I am explaining now, Counsellor, when you interrupted.

(Testimony of Thomas E. McGuire.)

Q. I didn't mean to interrupt you, and I am sorry I did. I was a little too impetuous.

A. Mr. Karesh was demonstrating the manner in which the package of narcotics had been passed through the door, at which time Ballard was standing immediately alongside me, and Karesh said, "Now, this is the way the package came through the door and you maintain that you were standing alongside—outside the door in the manner in which you are standing here, and you did not see this package being passed through the door?"

At that time Ballard then said, "Well, it does look ridiculous, and what do I get out of it? Will you dismiss the case against me?"

And at that time when Mr. Karesh stated that he would not, that was the termination of the conversation we had. So there was nothing that I can recall pertaining to probation.

Q. Was there anything said about any reward or immunity of any description that would be given to Mr. Ballard, or any consideration that would be given to Mr. Ballard if he would state that Mr. Ingoglia passed that package through the door?

A. There was absolutely no reward offered to the defendant. There was no promises made to him. The fact of the matter was the general discussion outside of the presence of Ballard, between Mr. Karesh and I was to the effect of Mr. Karesh doing something for the man. But that was outside of the defendant's presence. Mr. Karesh maintained

(Testimony of Thomas E. McGuire.)

that he would not dismiss the case nor would he offer or make any arrangements with the defendant whatever.

Q. My question, Mr. McGuire, was, Was there anything said to Mr. Ballard? Did you understand the question, Mr. McGuire? Not what was said between you and Mr. Karesh outside the presence of Ballard, but was there anything said to Mr. Ballard about any consideration being shown him?

A. I have stated no, sir, there was nothing that I can recall of Mr. Karesh making any promises to Mr. Ballard.

Q. However, there was a discussion, you stated, outside of the presence of Mr. Ballard, between you and Mr. Karesh?

A. Oh, yes, quite a bit of conversation relating to this case, the entire—all the phases of this case.

Q. Now, you tell me that Mr. Karesh informed Mr. Ballard that Mr. Ballard was being charged with standing outside of a door while narcotics were being passed in to Mr. White; is that what he said?

A. He stated that in substance, that that is one of the facts concerning this investigation, and in which he demonstrated. [234]

Q. Didn't you tell me on your direct examination just a moment ago that he informed Mr. Ballard that Mr. Ballard was being charged with the fact that he was standing outside a door while narcotics were being passed? Wasn't that your testimony?

(Testimony of Thomas E. McGuire.)

A. If I said it in those words, Counsellor, surely you understand that would not be a charge in the Federal court. The charge that I meant to bring out was that he was charged with a violation of the narcotic laws, and so far as he was then demonstrating the manner in which the narcotics was passed. That was one phase of the transaction, that Mr. Karesh was demonstrating for the defendant Ballard, the charge of him standing outside of the door, that indicating to Ballard that that was a condition, part of the proof that would be shown that Ballard was there, in that manner, and that he was standing outside of the door. Whether that was the exact charge, I don't recall Mr. Karesh ever saying that to Ballard.

Q. What I am asking now, Mr. McGuire, is this: Did you tell me in response to a question of Mr. Karesh not more than five or ten minutes ago that Mr. Karesh said to Mr. Ballard, "You are being charged with standing outside a door while narcotics were being passed through the door"? The question is, did you so testify on your direct examination?

A. I probably have said that, related that here on the witness stand since I have been here, yes, sir.

Q. Do you recall saying that? [235]

A. Yes, I do, right here now.

Q. That is what you said on your direct examination, is that correct? A. Yes.

Q. And that is what was told to Mr. Ballard?

(Testimony of Thomas E. McGuire.)

A. That was in substance told Mr. Ballard. Counsellor, you are taking exactly three words, whether Mr. Karesh related to him he was being charged with standing outside the door. I don't deny that I stated that here in my explanation of what Mr. Karesh was talking to Mr. Ballard about, but I am saying at the time Mr. Karesh talked to Ballard in his office, he was told he was charged with violating the narcotic law, and in furtherance of that, in the manner in which he violated it, was the fact that he was standing outside of a door when the narcotics was passed through it.

Q. You told me then a few minutes ago you were just giving me the substance, is that correct, of the conversation as to that particular phase of it. Now, start at the beginning, Mr. McGuire, and give me the exact wording, as near as you can recall, of everything that was said by Mr. Karesh, everything that was said by you, and everything that was said by Mr. Ballard in the presence of Mr. Ballard.

Mr. Karesh: He wants everything now. There are other defendants. There is a conversation about Mr. Ingoglia in there. If Mr. Deasy wants Mr. McGuire to state what was [236] said about Ingoglia and what was said about other narcotic men, it is all right with me. You have asked the question now and I can't protect Mr. Ingoglia at this stage, even if it is hearsay against him.

Mr. Dunning: I am going to continue to renew my objection that any reference to the defendant

(Testimony of Thomas E. McGuire.)

Ingoglia in this conversation is purely hearsay, and not binding upon the defendant Ingoglia.

The Court: I have already ruled that anything in the conversation brought out in the interview with Ballard would be received against Ballard and not as against any of the other defendants. It seems to me the conversations inquired into should be confined to the conversation with Ballard about Ballard's own alleged connection with these offenses.

Mr. Deasy: I will withdraw the question, if it please the Court, and I will ask you this:

Q. Tell me now, as near as you can recall, everything that was said by you, everything that was said by Mr. Karesh, and everything that was said by Mr. Ballard in connection with Mr. Ballard's activities in this particular case, in the exact words as nearly as you can recall.

A. On the occasion that Mr. Ballard was brought to Mr. Karesh's office in this building on November 3rd, the defendant was introduced to Mr. Karesh either by myself or directly by Mr. Karesh, that he was the United States Attorney, or I think I was [237] the one who told Mr. Ballard that Mr. Karesh was handling the narcotic cases and would be the prosecutor in this particular narcotic transaction.

Mr. Karesh asked Ballard did he know why he was being brought to this building, and why he was being questioned by the United States Assist-

(Testimony of Thomas E. McGuire.)

ant Attorney. Ballard said, "Well, I have been pinched, I know that, and there is supposed to be something about some narcotics."

Mr. Karesh said, "Well, you are charged with violating the Harrison Act. There are three or four other defendants with you. Now, I am very much interested in knowing how you come to be acquainted with Ingoglia."

I am repeating the conversation and trying to exclude the other defendants.

The Court: We understand. Go ahead.

The Witness: He said, "How did you get acquainted with Ingoglia? You know who Ingoglia is and you know the background of him.

He stated, "I don't know very much about Ingoglia," and at that time I believe I was the one who told Mr. Karesh that on a previous conversation that I had with Ballard, that Ballard had told me that he had met Ingoglia at the race track with McDonough, at which time McDonough had told Ballard that Ingoglia had a lot of narcotics, and that if Ballard knew any place where they could get rid of it. [238]

So Mr. Karesh then asked Ballard, "Is that so?" He said, "Well, I met him at the race track but I only know him a few days."

At that time Mr. Karesh said, "Well, you understand how you are involved in this thing, and involved in it in a rather serious way."

There were discussions about his attorney,

(Testimony of Thomas E. McGuire.)

whether he had an attorney, whether he was going to get an attorney. He had said he wasn't sure whether he would get an attorney or whether some friends would get it, or whether he needed one, and he was asking Mr. Karesh what he would have to do.

Mr. Karesh said, "Why not tell me the facts and all the circumstances, how you come to be involved in this thing?"

Ballard then asked him, "What is in it for me?"

Mr. Karesh said, "I can't tell you about that. You are charged to be released on bond. You have a right to get you an attorney. You will be indicted and then you can come into court and have your day in court, but I want to explain to you that you were standing in a hallway in Oakland, at which time a large package containing a large amount of narcotics was passed through the door."

And with that Mr. Karesh, with myself and Ballard, stood at the connecting door between the two offices in the suite of offices of Mr. Karesh's. Mr. Karesh indicated how the door was open, how the arm extended, and how the package was [239] passed through the door, and then he turned to Ballard and he said, "Do you mean to tell me that you were standing there with this man and you didn't see anything?"

At that time Ballard then stated, "Well, it sounds ridiculous." But he said, "What is in it for me? Will you dismiss these charges against me now?"

(Testimony of Thomas E. McGuire.)

And Mr. Karesh said, "That I will not do. You will be indicted and you will have your day in court, but we are here to ask you these questions and ask you if you want to tell us the story."

At that time Ballard then said, "Well, the hell with this. Let me get the hell out of here."

At that time the Marshal was called and he was brought away.

Q. As nearly as you can recall, you have related the conversation now as it took place between you and Mr. Karesh and Mr. Ballard with regard to Mr. Ballard's activity in this case, is that correct?

A. That is as near as I can recall it, counsel.

Q. Yes, and you are testifying from memory?

A. That is correct.

Q. You were referring to a conversation that you had had with Mr. Ballard the day before, or or a previous occasion?

A. Yes, sir.

Q. When was that previous occasion?

A. That was the day after he was arrested on a Monday. [240]

Q. Who was present at that conversation?

A. District Supervisor Mr. White and myself and the defendant Ballard, and in and out of the conference room at the City Jail in Oakland was Mr. Bertin. I am not recalling if he was there directly while the conversations were had, or not. He was with us in the City Jail. Whether he was present or not I can't answer.

(Testimony of Thomas E. McGuire.)

Mr. Deasy: That is all, thank you very much.

Mr. Dunning: I am going to ask that the court's ruling apply also to the second conversation that has been referred to here by Agent McGuire.

The Court: Yes, that applies to that conversation also. It will be received solely as against the defendant Ballard and not as against any of the other defendants. Any further examination of this witness?

Mr. Karesh: No.

Mr. Dunning: No questions, your Honor.

(Thereupon brief recess was taken.)

The Court: Call your next witness.

Mr. Karesh: Mr. Green.

Mr. Ehrlich: May we approach the bench, your Honor?

(Discussion at the bench off the record.)

Mr. Karesh: By consent of all parties, your Honor, may this case go over until tomorrow morning at ten o'clock?

The Court: That is agreeable to all counsel?

Mr. Ehrlich: Yes, your Honor.

Mr. Karesh: The request is made by all of us.

The Court: Ladies and gentlemen of the jury, I again instruct you that you are to observe the admonition I have heretofore given to you, and furthermore you are not to read newspaper articles concerning the case.

We will now adjourn until ten o'clock tomorrow morning.

(An adjournment was thereupon taken until tomorrow, Thursday, June 9, 1949, at 10:00 o'clock a.m.) [241a]

Thursday, June 9, 1949

The Court: You may proceed.

Mr. Karesh: Mr. Greene.

W. HAROLD GREENE

called as a witness on behalf of the Government; sworn.

The Clerk: Please state your full name to the court and jury?

A. W. Harold Greene.

Direct Examination

By Mr. Karesh:

Q. Mr. Greene, what did you say your full name was? A. W. Harold Greene.

Q. And where do you reside?

A. New York City.

Q. What is your occupation?

A. I am chief of identification of the Bureau of Internal Revenue of the Treasury Department, attached to the Alcohol Tax Unit.

Q. How long have you held that position?

A. Held that position for the last ten years.

Q. That is, for the United States of America?

A. Yes, sir.

Q. Where are your headquarters? [242]

A. New York City.

Q. And the headquarters cover what district?

(Testimony of W. Harold Greene.)

A. I have—my district covers all New England, six states in New England, New York, Puerto Rico, New Jersey and Delaware.

Q. What are the duties of your position?

A. The duties of my position, the criminology of fingerprints identification, classification, and instruction to the men in the field, the agents, which might entail the Secret Service, Alcohol Tax Unit, Intelligence, Coast Guard, Customs and Narcotic Agents.

Q. Tell me, have you had any special study in the matter of fingerprints? A. Yes, I have.

Q. What has that consisted of?

A. I took an instruction given by the Treasury Department in 1935 and then I availed myself of the opportunity from then on.

Q. Have you written any text-books?

A. Yes; I have just finished a book on single fingerprints. That is the only one written in this country.

Q. What do you mean by single fingerprints?

A. Single fingerprints is dealt with in criminology where you make a complete identification with just one fingerprint or a fraction thereof.

Q. How many fingerprints would you say you examine every year?

A. Approximately 100,000 prints a year. [243]

Q. And what is a latent impression?

A. A latent impression of the finger is a latent impression placed upon a surface by a person touching that surface.

(Testimony of W. Harold Greene.)

Q. Have you ever testified in court with relation to latent fingerprints?

A. Numerous times.

Q. What is an ink impression?

A. An ink impression is the rolling of a person's or subject's fingers that have been applied with ink upon a fingerprint card for future reference.

Q. Have you ever seen two people have the same prints?

A. No, sir. There is a possibility, there is one possibility on record out of six billion prints—that is four times the number of people in the world—at the ratio of one billion five hundred million, there is one record of identical prints being the same. That was in the United States Navy about twenty five years ago, a pair of twins, they had the same identificial prints on all ten fingers.

Q. With that one exception you have never heard of another instance where two people had the same prints?

A. There is none on record to my knowledge.

Q. Is there a certain type of paper that takes prints more easily or latent prints more easily than other types of paper?

A. There is.

Q. I am going to show you U. S. Exhibit No. 19, this brown [244] paper, here, and ask you if——

A. May I have that table or desk?

(A desk was placed in front of the witness.)

Q. I show you United States Exhibit No. 18 for Identification. First of all, I will ask you whether

(Testimony of W. Harold Greene.)

or not you have ever seen that particular piece of paper before.

A. I examined this paper in January, 1949, while I was here in San Francisco from New York, and I found no discernible fingerprints on this, due to the fact that there were many smudges where there had been fingerprints, but there were no discernible ones that could be detected and identified.

Q. Did you see the paper in the same condition it is, that is, discolored, at the time you examined it?

A. It was.

Q. Is that a type of paper which is difficult to detect latent impressions?

A. This is a soft-textured paper and all wrapping papers and bags and papers of this type are soft-textured, and therefore will absorb any moisture placed upon it very easily, and, after all, a latent fingerprint is moisture—about 98½ per cent of the fingerprint itself contains water, the other 1½ per cent contains a composition of *ureo*, fatty acids and albumen. Now, if a fingerprint was placed upon this paper it would be similar to paper of a newspaper, which is very absorbent, and the softer the paper the quicker the print will disappear, due [245] to the absorption by the paper.

Q. You say you have examined that paper and found numerous smudges. Did you find any latent impressions with sufficient markings from which you could make identification? A. I did not.

Q. How many markings must you have on a latent impression from which you can make an iden-

(Testimony of W. Harold Greene.)

tification, if you have, of course, an exemplar to make a comparison?

A. I have made it with as much as six or seven, but eight, nine to twelve is sufficient. In this case you have 14 similar characteristics that are identical.

Q. In this case, referring to the envelope I will show you shortly? A. That is right.

Q. U. S. Exhibit No. 31 for Identification. Did any of the smudges have any markings at all on them?

A. Several different smudges have ridges that you can see with the naked eye without using a magnifier or the glass, but they are so broken up by overhandling and overlapping with other fingers that you could not pick them out, you could not make them discernible to the eye or the magnifier.

Q. Therefore it is impossible to determine whose prints are on that package?

A. That is right.

Q. What is this substance, do you know, that discolored the [246] paper?

A. This is silver nitrate solution.

Q. If you place silver nitrate on a piece of paper, will it preserve a print?

A. It preserves a print indefinitely.

Q. Have you seen United States Exhibit No. 31 for Identification? A. I have.

Q. When did you see it?

A. I saw it here in January when I was here,

(Testimony of W. Harold Greene.)

and I also had it in my possession in January, from January on.

Q. Then did you bring it back and return it to the office of the Bureau of Narcotics here to Mr. Grady? A. I did.

Q. Have you ever seen this document which I show you, a fingerprint card, U. S. Exhibit 17 for Identification? A. I have.

Q. Where did you see that, and what is it?

A. That is a fingerprint card of ten fingers of a person.

Q. Whose name is on that card?

A. John Stoppelli, the defendant.

Q. Did you make a comparison with the print on the envelope—there is a print on the envelope, isn't there?

A. There is, positively, yes.

Q. Did you compare the print on the envelope with the print [247] on the card, here?

A. I did.

Q. Now, tell me, when did you first hear from the San Francisco Office that they wished you to make some fingerprint analyses?

A. The last few days of November, 1948.

Q. What was sent to you?

A. Through the——

Mr. Ehrlich: To which we object, your Honor, on the ground it is incompetent, irrelevant and immaterial.

The Court: What was the question, "What was said to you?"

(Testimony of W. Harold Greene.)

Mr. Karesh: What was sent to you.

The Court: "Said" or "sent"?

Mr. Karesh: Sent.

Mr. Ehrlich: I thought you said "said." Withdraw the objection.

Mr. Karesh: That is my Southern accident.

A. Contact prints, small contact prints of a latent print found on the surface of envelopes were sent to me in to New York, they were sent to the New York Office of the Narcotic Bureau, which in turn turned them over to me.

Q. And from those photographs you made an identification? A. I did.

Q. Later on when you came out here you finished that identification, is that right? [248]

A. I did.

Q. By the way, did you have extra copies of the fingerprint cards? A. I do.

Mr. Karesh: Maybe we can give some to counsel.

A. Surely.

(Mr. Karesh handed some documents to counsel.)

Mr. Karesh: May I pass some of these out to the jury?

The Court: No, not until they are received in evidence.

Mr. Deasy: Do you have another copy of this?

Mr. Karesh: Yes. Do you want to continue looking at them? Maybe we better give them one apiece over there (handing other documents to counsel). You two can look at one.

(Testimony of W. Harold Greene.)

Q. (By Mr. Karesh): What is this that I hold in my hand. I now give to you.

A. This is a chart that I have made up with enlarged replicas of latent fingerprints of John Stoppelli, and the known fingerprints of John Stoppelli.

Q. Now, where did you get the latent prints of John Stoppelli from?

A. From the envelope that I examined and identified.

Q. Is this the envelope? A. That is.

Q. That is the latent impression?

A. That is right.

The Court: What exhibit is that? [249]

Mr. Karesh: That is United States Exhibit 31 for Identification.

Q. The print on United States Exhibit 31 for Identification that we call the latent impression is the latent impression that you made on this card? It is a photograph, isn't it?

A. That is right.

Q. Then you have the known fingerprint. What is that?

A. That is the ink impression of the defendant John Stoppelli that was taken when he was arrested.

Q. You are referring now to United States Exhibit No. 17 for Identification, is that right?

A. That is right.

Q. Now, what finger does it represent?

A. That represents the ninth finger or the ring finger of the left hand.

(Testimony of W. Harold Greene.)

Mr. Karesh: At this time, may it please your Honor, we would like to mark for identification this fingerprint identification. We would like to have the latent fingerprint marked one number and the known fingerprint marked another number.

The Court: Very well, they will be marked.

Mr. Ehrlich: What are those numbers?

The Clerk: 35 and 36 for Identification.

Mr. Karesh: Which is 35?

The Clerk: It will be the latent, and 36 the known.

(The cards were marked, respectively, the latent 35 and the known 36 for Identification.)

Q. (By Mr. Karesh): The latent 35, U. S. Exhibit No. 35 for Identification, and the known print is U. S. Exhibit 36 for Identification. In other words, sir, U. S. Exhibit No. 36 for Identification is the same as U. S. Exhibit 35 for Identification, is that right?

A. That is right, and 36.

Q. And the photograph of U. S. Exhibit No. 36 came from this card, U. S. Exhibit No. 17?

A. That is right.

Q. Now, whose print is on this envelope?

A. John Stoppelli's.

Q. By John Stoppelli do you mean the defendant John Stoppelli that is in the courtroom?

A. Yes, sitting over there on the right.

Q. Now, how did you come to that conclusion

(Testimony of W. Harold Greene.)

that the print on the envelope is the print that belongs to John Stoppelli, the defendant?

A. We have a national book, every district supervisor in the country, in the Narcotic Bureau, has a national book published by the Narcotic Bureau, all of the major known——

Mr. Karesh: Just a minute, pardon me——

Mr. Ehrlich: I——

The Court: Yes.

Mr. Karesh: Just a minute. Q. I am asking you how did you make your—— [251]

Mr. Ehrlich: Pardon me a moment, Mr. Karesh. I ask that, 1, the witness be instructed not to volunteer, and, 2, I assign the statement made by the witness as prejudicial misconduct, and on the part of the district attorney inquiring for it, and, 3, I respectfully ask the court to instruct the jury to disregard it.

The Court: Yes. I first instruct the witness to confine his answers to questions. Don't go beyond the scope of the question asked by counsel. I strike the answer this witness just made in so far as he made an answer, and I instruct the jury to entirely disregard the answer which I have just stricken from the record. Any and all matters that are stricken from the record must be entirely disregarded by the jury. Proceed.

Q. (By Mr. Karesh): How do you know that the latent impression and the known fingerprint, which you say is the known fingerprint of John Stoppelli, how do you know they are the same?

(Testimony of W. Harold Greene.)

What is the basis of that opinion? That is what the jury would like to know.

A. The basis of that is the 14 points of comparison that I have enumerated on the chart.

Mr. Karesh: Now, your Honor, at this time we would like to offer in evidence United States Exhibits Nos. 35 and 36, so that they may be passed on to the jury, that they may see them as Mr. Greene tells them how he reached the conclusion. [252]

The Court: They will be received.

Mr. Dunning: I assume they are being introduced as to one defendant?

The Court: Yes.

Mr. Karesh: No, may it please your Honor, at the end of this we will make our offer as to all the defendants. At this time it is only offered as to the defendant John Stoppelli.

The Court: It will be so understood.

(The charts referred to were marked U. S. Exhibits 35 and 36 in evidence.)

(Mr. Karesh handed copies of the charts to the jury.)

The Court: You are handing to the jury copies of this exhibit?

Mr. Karesh: Yes, United States Exhibits 35 and 36.

The Court: Of course, Counsel has not seen the copies that you handed them.

Mr. Karesh: Yes, they have, I handed them to counsel.

(Testimony of W. Harold Greene.)

The Court: They have copies, but whether they are the same as the copies handed to the jury I don't know. I assume they are.

Mr. Karesh: They are the same, your Honor.

The Witness: Positively.

Q. (By Mr. Karesh): Make the explanation to the jury as to how you reached your conclusion.

A. These are comparable characteristics of the latent print [253] which is on the left-hand side of the page which you hold in your hand and the next print which is on the right-hand side of the page.

Characteristic No. 1 is a downward bifurcation—

Q. What does that mean?

A. A bifurcation is where a ridge would run along in a certain direction in the finger and all of a sudden diverge, one part going to the right and one part going to the left, the same as a fork in the road, if you are driving an automobile you come to a fork in the road, or it may be two ridges running parallel to each other and one will diverge to the right and one to the left.

Q. Go ahead. As you come to technical terms you explain the technical terms to the jury.

A. Yes, sir. The No. 1 characteristic is a downward bifurcation forming the upper bridge of the delta and the first complete ridge running in front of the delta.

A delta is the formation of a bifurcation at a certain point in the pattern of a fingerprint which gives you a ridge count from the delta to the core of the pattern, and the core of the pattern in a

(Testimony of W. Harold Greene.)

fingerprint is the innermost recurring ridge of the pattern.

Q. You referred to point 1?

A. That is point 1.

Q. Now, will you go to point 2? [254]

A. Point 2 is a downward bifurcation, the third ridge slightly above and to the right of No. 1 characteristic, so noted in the latent fingerprint and the known fingerprint chart.

Q. In other words, everything that appears in point 1 in the known print is likewise in the latent print?

A. That is right.

Q. These are your points of comparison, 14 points of comparison, that is what you mean?

A. Yes, sir.

Q. Go ahead.

A. No. 3 characteristic is a downward bifurcation forming the upper part of the delta, which the back ridge of the delta goes to form a part of the downward bifurcation of characteristic No. 1.

If you will look at No. 1 characteristic on this you will see where the top bifurcation points downward to No. 3 bifurcation, and a part of that bifurcation is the back ridge of the delta.

Q. Go ahead.

A. No. 4 is an upward bifurcation forming the lower part of the delta, one ridge running to the left and the other ridge running to the right to form the delta, as I just explained earlier, and a bifurcation. No. 4 is a ridge beginning or ending—that is something that has never been determined,

(Testimony of W. Harold Greene.)

where a ridge begins or where it ends. When it stops abruptly [255] in a fingerprint it might be the beginning of a ridge and run continuously in circles and zigzag formation, or it might be the end of that ridge which began in another aspect of the fingerprint, itself.

There is a ridge beginning or ending in the latent fingerprint which forms the ridge below the left ridge of the lower bifurcation, while in the known fingerprint this ridge has the appearance of forming an upper bifurcation, which is due to pressure exerted upon the finger while the fingerprint was being taken.

In many instances you will find two prints side by side running parallel with each other, and in between those two prints you will find a ridge ending or beginning. That is in the latent fingerprint. In the known fingerprint, where the extra pressure on the fingerprints in rolling an impression of the subject, that much pressure impresses or pushes the bulb of the finger on the smooth surface, so that pushes that ending or beginning of the ridge against one side or the other of the adjoining ridges, and it might have the appearance of being a bifurcation.

No. 6 a ridge ending or beginning in the latent fingerprint, while in the known fingerprint this ridge has the appearance of forming an upper bifurcation, as in characteristic No. 5.

That I just explained. [256]

No. 7, In the latent fingerprint this is a ridge ending or beginning, but in the known fingerprint,

(Testimony of W. Harold Greene.)

this ridge has the appearance of being attached to the ridge above it to form an upward bifurcation.

No. 8, A ridge ending or beginning two ridges below characteristic No. 7, in the latent fingerprint, while in the known fingerprint this ridge seems to be attached to the ridge directly about it to form an upward bifurcation.

No. 9 is an upward bifurcation forming the lower part of the delta attachment, directly below characteristic No. 4.

And No. 10 is an upward bifurcation, the lower ridge forming the lower part of the delta going to the right, while the upper ridge of the bifurcation passes in front of the delta.

No. 11, a ridge beginning or ending, the fourth ridge in front of the delta.

No. 12, the broken core of the pattern.

No. 13 is the innermost recurving ridge of the core of the pattern, of the fingerprint.

No. 14 is a ridge beginning directly above characteristic No. 1 and seven ridges from the innermost recurving ridge of the pattern of the core.

Those are the fourteen characteristic points. The same are identical in all phases as far as relationship of one to the other.

Q. In other words, you have fourteen points of comparison or [257] fourteen points of similarity?

A. Fourteen points of comparable characteristics.

Q. Do you consider fourteen points sufficient to make in your mind a positive identification?

(Testimony of W. Harold Greene.)

A. I do.

Q. What is the minimum number of points of similarity required to make identification?

A. There are records of positive identification being made on as low as five or four. I have never gone below six, myself.

Q. But you consider fourteen——

A. Fourteen is very good.

Q. ——very sufficient. Now, tell me, that envelope, has that been treated, United States Exhibit No. 31 for Identification, has that been treated with any substance?

A. Yes, that has been treated with silver nitrate solution.

Q. What is the purpose of the silver nitrate solution?

A. To bring out the fingerprints and intensify any prints if there are any prints on the object.

Q. Does the silver nitrate solution preserve the print?

A. The silver nitrate solution preserves it.

Q. How long will that print on U. S. Exhibit 31 for Identification, how long will it last, would you say, after it is treated?

A. With this silver nitrate solution treatment on this particular piece of paper or any other paper of hard sizing or fairly hard sizing or bond paper, they should last fifteen or twenty years, provided you don't put them in the sun light. [258]

Q. That is after it has been treated?

(Testimony of W. Harold Greene.)

A. After it has been treated with silver nitrate solution.

Q. Let me ask you, under ideal conditions, before the envelope was treated how long would the print remain on there?

A. On this type of paper, which is a sort of soft textured paper, that envelope, I would say from my experience the print would not be—would not last under ideal conditions any more than from 2 to 3 to 4 weeks at the most, provided it wasn't handled.

Q. In other words, it is your testimony that that print on U. S. Exhibit 31 for Identification had been placed on there no more than four weeks prior to the time the envelope was treated with the silver nitrate solution?

A. I would say that is right, yes.

Q. It would not be a year?

A. Oh, no, no.

Q. Now, you are referring to a print on the envelope—I notice there are several markings on that envelope, several writings. What particular print are you referring to that you have talked about and has now been identified as the latent impression on the photograph U. S. Exhibit 35 for Identification?

A. I refer on this envelope to the lower right-hand corner, to the front surface here of the envelope, and toward the side of the envelope, as the latent print in question. [259]

Q. I am wondering whether we could put a mark, an "X" on this envelope. Have you got a pen?

A. I have.

(Testimony of W. Harold Greene.)

Q. Within the circle.

A. My initials are right next to the latent fingerprint for identification, in red ink.

Q. It is not on any other place on the envelope, your initials?

A. My initials on this envelope—I found another fingerprint on this envelope, and I initialed that also.

Q. Now, you have your initials on two places on the envelope.

A. Oh, yes, that is right.

Q. We are now speaking of the print adjacent to the word “thirty-one” written in the left-hand corner.

A. That is right.

Q. I think that has been sufficiently identified. Now, tell me something, could you tell whether or not John Stoppelli put his finger on there? Is it possible that a stamp made that print?

A. No, he had to touch the envelope. No stamp can be made—that is too easily detected an experienced person.

Q. What do you mean about “easily detected”? How could you detect that wasn’t, let us say, a forged fingerprint?

A. Well, forged fingerprints are so rarely done, but when they are done they are so easily detected, for the simple reason you transport a fingerprint from one surface to another, and [260] when you take off a fingerprint for transposition to another surface you break up the ridges, and that is the first notable thing that an experienced person looks for,

(Testimony of W. Harold Greene.)

and when any doubt might come in his mind of that he would resort to use of poroscopy, the study of pores.

Q. How do you spell that?

A. P-o-r-o-s-c-o-p-y.

Q. Go ahead.

A. First you study poroscopy, a study of the pores. Your ridges have many pores on the skin on the fingers, that is what actually makes the fingerprints, and you would find the impressions of the pores, themselves, would be all torn and spread and placed in different positions from the transposition.

Q. Mr. Greene, then it is your testimony that you are positive that John Stoppelli held this envelope in his hand and what finger?

A. That is the ring finger of the left hand, the ninth finger.

Q. He held it in his hand?

A. The ninth finger is what we call it on the fingerprint card. You start with No. 1 is the right thumb; the right index finger is No. 2; the middle finger of the right-hand is No. 3, and the ring finger of the right hand No. 4 on the fingerprint card; and the little finger of the right hand is the No. 5 finger; and the thumb on the left-hand is the sixth finger on the fingerprint card; No. 7 is the index finger of the left hand, No. 8 is the middle finger of the left hand, No. 9 is the ring finger [261] of the left hand, and the tenth finger on the fingerprint card for classification purposes is the little finger of the left hand.

(Testimony of W. Harold Greene.)

Q. You now hold in your hand, you have United States Exhibit 17 for Identification: With particular reference to what finger is that?

A. The ring finger of the left hand, No. 9.

Q. Now, can you state, sir, whether at the time John Stoppelli held that envelope in his hand, whether or not that envelope was empty, or whether or not it contained something?

A. I would say it contained something.

Q. And what would you say—what kind of substance, if you know, did it contain?

A. Well, from my experience it had to be a powdery substance, for the simple reason that the intensity of the fingerprint, the latent fingerprint on this particular envelope, shows that the right side as you look at it, or the left side of the fingerprint itself, that the duct covering a part of the delta, the duct on the ninth finger of the left hand, that when there is a powder in an envelope of any type, and especially after it has been placed in the glassine envelope and placed in this envelope, that anyone that grasps the envelope, there is a movement of the powder inside, because naturally we have to put more pressure on the holding of an object in this case with that content in the envelope than you would if the envelope was just as it is now.

Q. You call that an intensified latent impression?

A. The right side of the picture in your charts will show you what I mean by intensity of the latent print itself and not the next print.

(Testimony of W. Harold Greene.)

Q. Will you explain that to the jury, the intensity?

A. The intensity was made there due to the holding of heightened pressure being placed upon that part of the finger when he grasped the envelope and, after all, the envelope was laying on his ring finger with his left hand in this fashion.

Q. (By Mr. Ehrlich): What fashion was that?

A. In that fashion (indicating). As the movement of the powder inside the envelope or the two envelopes sort of moved, because he had to exert a little pressure. You still would not get the bulged surface or, I would say, the concavity surface of the material in the package. You would get a concavity in the package after you placed the finger by gripping it, the same as we have all had the experience of buying sugar in a bag in a store, and when you grasp the bag of sugar, your fingers to a certain extent, one side or the other, each finger will make an impression in the bag as you hold it.

Q. (By Mr. Karesh): How did he grasp that, in your opinion?

A. In my opinion, he grasped it this way (indicating), which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type——

Mr. Ehrlich: Your Honor——

Mr. Karesh: We will ask that go out.

Mr. Ehrlich: Your Honor, this witness is too anxious. May I suggest that he be cautioned?

(Testimony of W. Harold Greene.)

The Court: Yes, be very careful. You have had experience as a witness in such matters. Be careful and restrict your answers to the question asked.

Q. (By Mr. Karesh): Can you see that it was grasped on the back by a thumb?

A. There have been fingerprints of that area on the back of the envelope, overlapped by several fingerprints, and it just shows ridges. There is no identification made on the back side of the envelope.

Q. Why did you say there was no identification?

A. Because of the overlapping of several ridges and prints that were not discernible.

Q. You have another latent impression there with several markings on it that you have your initials inside of. How many markings there, if you know?

A. Well, as latent prints go, this is a very good latent print.

Q. But you have been unable to find out whose print that is?

A. I have been unable to identify it to anyone I have examined it with and compared it with.

Q. In other words, you have only been able to make one identification; so far as the other is concerned, you can't tell who it [264] is?

A. I know definitely the other print is not John Stoppelli's.

Mr. Karesh: That is all.

May I at this time, Your Honor, offer the en-

(Testimony of W. Harold Greene.)

velope, U. S. Exhibit 31, as well as U. S. Exhibit 17 for identification, with particular reference to the ring finger, in evidence against John Stoppelli?

The Court: It may be received.

(United States Exhibits No. 17 and 31 for identification were thereupon received in evidence.)

Cross-Examination

By Mr. Ehrlich:

Q. Mr. Green, as I understand it, you first studied this subject in 1935, is that correct?

A. 1935 I started, yes.

Q. For what length of time did you study it?

A. I studied from then on up to the present date.

Q. In other words, you work at this all the time?

A. Continually, nothing else.

Q. I take it that in your work for the Government you only testify for the Government, is that right?

A. I have, yes, in Federal Courts and other courts, city and state.

Q. You have, I take it, a complete background in the subject? A. I think I have.

Q. From a study of the subject can you tell us when was the [265] first time in history when fingerprints were used?

A. Fingerprints were used by the Babylonians and during the Tang dynasty from 608 to 907.

(Testimony of W. Harold Greene.)

Q. And when was it used by the Babylonians?

A. In the year of 400 B.C.

Q. And the Chinese used it from 608 to 907?

A. That is right, as a means of identification.

They used it as a means of identification whereby they used it—the Babylonians also used to make an impression of their thumb in clay when it was a question of documents to be signed or identified in wills and bequeaths and so on.

Q. Bequests, you mean? You do not mean bequeaths. A. Well, bequests.

Q. Isn't it a fact that the Chinese never used it until the 12th century?

A. No, I wouldn't say it was.

Q. That is not a fact? A. No.

Q. Isn't it a fact that the Government of the United States during the war told all its fingerprint experts that the Chinese were the first to use it and used it in the twelfth century?

A. I don't know what the Government did.

Q. You remember that?

A. I didn't take that instruction. I had it with the Government before the war. [266]

Q. Would you say the Government teaching its Army and Navy personnel that the Chinese first used it in the twelfth century, would you say that that was wrong?

A. To the best of my knowledge. I think they used it before.

Q. Would you answer my question, please?

(Testimony of W. Harold Greene.)

Would you say it was wrong if the Army taught its personnel its first use was by the Chinese and that was in the twelfth century?

A. Well, I wouldn't say it was wrong and I wouldn't say it was right.

Q. But at least that disagrees with your opinion, is that right?

A. That disagrees with my opinion.

Q. When is the first time that fingerprints were used for the identification of criminals?

A. The first record that I found was an Italian lawyer by the name of Quintilian. That was probably—I will get the exact date as close as I can—in the sixteenth century in Rome, in a murder case, where a stepson was accused of killing his father, and at the scene of the crime they found palmprints and fingerprints on the wall, and the defense attorney——

Q. Pardon me for interrupting you, but when was that, please?

A. In the sixteenth century.

Q. The sixteenth century, and that was used by an Italian? A. Yes.

Q. And, I take it, that must have been in Italy?

A. Yes, in Rome. [267]

Q. Isn't it a fact that it was first used, not in Italy, but in India, and it was first used in the year 1880? A. No.

Q. For the identification of criminals?

A. Not as far as I am concerned, no.

(Testimony of W. Harold Greene.)

Q. Isn't it a fact that the Government of the United States in training its men in the OSS during the war taught that it was first used for the identification of criminals in India and in the year 1880?

A. I don't know what they taught.

Q. Would you say that that was wrong?

A. I say if they said 1880, it was wrong.

Q. When was the first general use by a criminal investigation department of any kind? When was the first general use made of fingerprints?

A. The first general use, used by a crime investigating agency, was Scotland Yard in 1898, Father Galton and Sir Henry Hurschel, who was prior to that time in Nepal, in Bengal, India, as director of police.

Q. Did you know that the United States Army and Navy in teaching its men said that it was first used—did you say 1898?

A. 1898 by Scotland Yard as an agency.

Q. Yes, as an agency. A. Yes.

Q. ———said it was used in 1890; would you say that that was [268] wrong?

A. I wouldn't say it was wrong, I wouldn't say it was right. I was talking about the question you asked me.

Q. But it disagrees with what you say, is that right? A. That is right.

Q. We will get a little closer to home. When was it first introduced in the United States?

(Testimony of W. Harold Greene.)

A. It was first introduced in the United States as a means of identification in the latter part of 1906 by the United States Navy, and on January 1, 1907 it was taken over by the Navy, and in 1913 it was set up—a bureau of investigation in Washington, and those records were placed at Leavenworth Penitentiary, and in 1923 the FBI took over.

Q. Let us take a piece at a time. You are an expert and I am not. I can't follow all of that. Just answer my first question, please. You said it was first used in the United States in 1906?

A. In the latter part of 1906 as a means of identification.

Q. That is all we are talking about. Did you know that the Government of the United States taught its Army and its Navy that it was first used in 1903?

A. I didn't know it.

Q. Would you say that that is not true?

A. I am not concerned with what they taught the Army.

Q. Would you be kind enough to answer my question? Would you say it was true? [269]

A. I wouldn't say it was true and I wouldn't say it was right.

Q. You mentioned Leavenworth, didn't you?

A. Yes.

Q. When was the first time Leavenworth adopted it?

A. They were placed—after the Navy started the use of investigation, the use of identification by

(Testimony of W. Harold Greene.)

means of fingerprints on January 1, 1907, those records were kept from then on——

Q. When did Leavenworth first start to use them, please? 1907?

A. Not to use them. They were kept there, the records.

Q. When did they first start fingerprinting at Leavenworth?

A. When did they first start fingerprinting at Leavenworth?

Q. Yes. A. At that time.

Q. 1907? A. Yes.

Q. Well, if I tell you that the United States Government——

Mr. Karesh: Mr. Ehrlich, may I interrupt you? When you say the United States Government, who in the United States Government? I will ask you to lay a proper foundation for that question.

Mr. Ehrlich: I presume that in teaching the soldiers and in teaching the Army, Navy, Marine Corps and Coast Guard, I have no way of knowing who taught it. I am asking this man, who says he is an expert, whether he knows these things, and if he says they are wrong, they are wrong. If he says they are right, they [270] are right.

Mr. Karesh: Will you concede that if he says they are wrong, they are wrong and if they are right they are right?

Mr. Ehrlich: That is what he says, yes.

The Court: Proceed.

(Testimony of W. Harold Greene.)

Q. (By Mr. Ehrlich): Isn't it a fact that Leavenworth and Sing Sing first commenced using it in 1904 for identification of alleged criminals?

A. Not to my knowledge, no.

Q. And if I tell you that that was what was taught by the United States Government to its military forces, you would say that that was wrong?

A. No, I wouldn't say it was wrong and I wouldn't say it was right.

Q. In any event, that disagrees with you, doesn't it?

A. It disagrees with me entirely.

Q. When was it generally adopted?

A. Generally adopted by the United States Navy as a general rule of this country for identification from then on up to the present time.

Q. When did the peace authorities——

A. From that time on. Certain police authorities and cities adopted fingerprinting.

Q. From what time? A. From 1913 on.

Q. Now, the United States Government in teaching its men during the war, taught them that the International Association of Chief of Police in 1906 adopted it; would you say that that was wrong?

A. I told you in 1906 it was first used as a means for identification, the latter part. It was adopted by the Navy in 1907, on January 1st.

Q. The Government did not teach it; it was adopted by the Navy. The Government taught it was first adopted by Leavenworth in 1904. Would you say that that was wrong?

(Testimony of W. Harold Greene.)

A. I would say it was not adopted by Leavenworth in 1904 at all. They did not get the records out there—start to get records out there until 1906.

Q. Do you mind if I read this to you?

Mr. Karesh: May I ask what you are reading from?

Mr. Ehrlich: Yes. I am reading from the actual instruction sheets given to men in the field.

Mr. Karesh: By whom?

Mr. Ehrlich: By the Army of the United States.

Mr. Karesh: When?

Mr. Ehrlich: During this last war. I can't give you the date.

Mr. Karesh: Counsel, I have one here, too.

Mr. Ehrlich: Please read it and you will see my dates are correct.

Mr. Karesh: I still do not know what you are reading from. [272]

Mr. Ehrlich: I am just reading to him. May I continue?

Mr. Karesh: Tell me what you are reading from. I want to know.

Mr. Ehrlich: I have just told you, sir.

Mr. Karesh: What?

Mr. Ehrlich: The instruction sheet given to the Army of the United States, the OSS——

Mr. Karesh: Did you say the OSS?

Mr. Ehrlich: Yes, the OSS, too.

Mr. Karesh: Thank you.

(Testimony of W. Harold Greene.)

Mr. Ehrlich: Mr. White is a member of that. He ought to know.

“The wardens of Sing Sing and the United States Penitentiary at Leavenworth, Kansas began the fingerprinting of persons incarcerated in or employed by these institutions about 1904.”

Q. Is that correct?

A. I would not say it was correct.

Q. When did Leavenworth start keeping the files?

A. The latter part of 1906 and the first of 1907.

Q. When did the FBI get them? A. 1923.

Q. If I told you that the FBI got them in 1924, would that be wrong?

A. It would be wrong as far as I am concerned. That is what [273] they set it up for in 1923.

Q. This tells me that the Leavenworth files were given to the Federal Bureau of Investigation in 1924. Would you say that that was wrong, sir?

A. As far as I am concerned, it is wrong.

Q. And the files of the FBI, on what system are they based?

A. What do you mean, what system?

Q. Well, there must be some basic system upon which they base their files or which they follow.

A. You mean they conduct the files?

Q. No, what system. I take it from what you said before there were two or three different kinds of systems.

A. They use the Henry system with their own

(Testimony of W. Harold Greene.)

certain modifications and additions. Basically the Henry system is used for all fingerprints practically throughout the world now.

Q. So that everything in connection with the matter in the Henry system as taught, that is the basis upon which you have made these comparisons?

A. That and the Batley single fingerprints from Scotland Yard.

Q. Isn't it a fact that all identifications are made on the full two hands?

A. Positively no.

Q. Isn't it a fact—I understood you to say you were the only one who made an identification on one finger—— [274]

A. No, you misunderstood me, if you understood it that way.

Q. I am sorry. You wrote a book on it?

A. I wrote a book on it.

Q. You are the only man who did?

A. I said that was the only book written in this country on single fingerprints to date.

Q. I didn't understand you to say this country, but you qualified it by this record.

A. Yes, it is in the record.

Q. Are there books on single fingerprints written in other countries?

A. Mr. Batley wrote the original book on it. I used some of his basic principles, not all of them, with my own modifications and additions.

Q. But isn't the system followed by all examiners based on the full cards——

(Testimony of W. Harold Greene.)

A. Fingerprint cards?

Q. Yes. May I have it, please? Based on all the fingers and then each finger and some individually?

A. If you are talking about making a classification of that card, you make a classification of the ten fingers, but when you come to identification, where you deal solely with one finger, you are not concerned about the other nine fingers.

Q. Explain to me, please, why after taking each one individually, they take each hand. What is the purpose of that? There must be some reason for it.

A. The reason for taking the roll impression, the top [275] impressions here and these lower impressions here, is to get the fixed points. The fixed points are the delta and the core, and all characteristics, as to injuries and so on, that may be on the side of the finger. Then at the bottom you will note that the plane impressions, that we call the plane impression or just the inking impression of the fingers, are placed upon the card thusly to give you the core mostly of the pattern. In some cases the delta also shows where it is very close to the core.

Q. Mr. Greene, isn't it a fact that the reason that each hand is taken in the actual position of the fingers and the thumb is because if you misplace or change the position of one of these single ones, you can't make an identification, isn't that true?

A. Say that again, please.

(Testimony of W. Harold Greene.)

(Question read.)

A. Do you mean if one of the fingers was placed in another position on the card that you can't make an identification?

Q. I am asking you, sir. I am not an expert on that subject.

A. I am asking you if you mean by misplacing one of the fingers on the card——

Q. Changing them.

A. All right, changing them. Regardless of what position those fingers are on the card, that would never stop an identification.

Q. It would never stop it?

A. No, sir, because you go by the finger itself regardless of [276] what position it is on the card.

Q. Would you say that this was wrong? "The transposition of two or more fingers on the card probably will result in a totally different classification preventing identification."

A. That is a different thing entirely from identification. That is for classification purposes. If you take the card——

Q. In other words, you could not classify it but you could identify it, is that correct?

A. You could classify it, but if you will let me explain it——

Q. What did you mean when you said a different thing. I want to follow you.

A. This fingerprint card, you start with the right

(Testimony of W. Harold Greene.)

thumb at the top of the fingerprint card to take an impression and put the impression on this card. The index finger is next, the middle, the ring finger and the little finger of the right hand on the top row. Many times carelessness is expedient in taking these prints by certain agents. It happens quite often. An agent will take the left hand completely on the top and he will put the right hand at the bottom. Unless you are an experienced classifier, that will throw your classification off completely. Then you have to know when the right hand is concerned and the left hand. Then the idea is to mark the card accordingly, where it says right hand at the top, left hand at the bottom, you just reverse them and you make the classification as it is right there. [277]

Q. I asked you, Mr. Greene, whether the change of one finger would not prevent classification and identification. You said it would not.

A. It would not.

Q. I read to you the statement where two or more fingers on a card probably will result in a totally different classification, permitting the identification when the search is made, and you now tell me about a whole line. I am not asking you that. I am asking you if what I just read to you is true or untrue. Can you answer that?

A. If a card has not been classified properly, you will not find it in a search.

Q. All right, you can't find it.

(Testimony of W. Harold Greene.)

A. But for identification purposes——

Q. So that—pardon me.

A. For identification purposes you are dealing with the individual fingers as single fingerprints.

Q. But you have to go look for them somewhere, don't you?

A. When it comes to single fingerprints——

Q. Please, Mr. Greene.

A. No. Will you let me explain?

Q. Will you answer it, please?

A. I would have to look for it, naturally, to find it.

Q. If you have only one finger you have to go and look for it? A. Yes. [278]

Q. So it all depends on what you want to look for, is that right?

A. It all depends on what you want to look for, sure. It all depends on the classification.

Q. Please. It all depends on what you want to look for, is that correct? A. Yes, sir.

Mr. Ehrlich: Does Your Honor want me to continue?

The Court: We will recess. You will observe the admonition.

(Recess.) [279]

The Court: You may proceed.

Q. (By Mr. Ehrlich): I understand, Mr. Greene, that you found no prints on this bag, Prosecution's No. 18. A. That is right.

Q. And your reason for that was what, please?

(Testimony of W. Harold Greene.)

A. My reason, there were so many overlapping prints and ridges there that there were none discernible.

Q. In other words, there could or could not have been prints, but you weren't able to discern any?

A. That is right.

Q. And on Exhibit 31—do you have that, sir?

A. Right here.

Q. On Exhibit 31 you did find some prints, did you? A. Yes, sir.

Q. And one print you worked on, is that correct? A. What was that?

Q. And on one print you worked of all the prints that you found on that envelope, 31?

A. I identified—I mean I found two on that particular envelope.

Q. But you only worked on this one?

A. I identified one.

Q. One? A. Yes, sir.

Q. I take it—I don't see it, but I take it it is enclosed [280] in this green——

A. Right there (indicating).

Q. Pardon me? A. Right there.

Q. I am sorry, I don't see it, but it is in this——

A. It was in that area.

Q. It was in this area? A. Yes, sir.

Q. And you say that that print was made by the ninth finger, which you call the ring finger?

A. The ring finger of the left hand.

Q. And it is made, if it is on there, of course, it is made by this finger as I have it (indicating)?

(Testimony of W. Harold Greene.)

A. That is right.

Q. Is that correct, sir? A. That is right.

Q. Explain to me, sir, how that was held up there, how that was held with that finger.

A. It wasn't held with that one finger, it must have been grasped here with the thumb.

Q. Must have? A. Surely.

Q. You don't find any thumb there?

A. The record——

Q. Please, sir, do you find any thumb under that finger?

A. I found presses of other ridges of prints that were overlapping [281] and that were not discernible.

Q. Will you show those to me?

A. They were within that area (indicating).

Q. Right there? A. Right there.

Mr. Karesh: Would you mark that right there?

A. No, I didn't mark it.

Mr. Karesh: I would like you to do it.

Mr. Ehrlich: May I continue with my examination, please?

Mr. Karesh: Pardon me.

Q. (By Mr. Ehrlich): You say now you have a print back here, is that right?

A. I said there were presses of it.

Q. Presses? A. Yes, sir.

Q. Let me ask you, sir, in holding a package like that where would the real hold be, right there, is that right (demonstrating)?

(Testimony of W. Harold Greene.)

A. If you hold it like that the real hold would be like that, but naturally you would hold it like that (demonstrating).

Q. You would hold it this way (demonstrating)?

A. Yes, sir.

Q. And you would seal it, is that the point?

A. That is right.

Q. So that when you said a little while ago that there was [282] something in there, he put it in there and then instead of just sealing it like this with his fingers, instead of just sealing the envelope he went to the trouble of doing this and this and sealing it (demonstrating).

A. I wouldn't know which method he used, I wasn't there.

Q. Would he just pick it up just like this (demonstrating)?

A. That is the way, the ordinary way of handling.

Q. That is the way it was handled?

A. Yes, sir.

Q. It must have been a heavy object, wasn't it?

A. I wouldn't say it was heavy. It was probably heavy for an envelope of that size. It was ordinarily heavier than a letter would be.

Q. If I held—this has some of this stuff in it—

Mr. Karesh: What are you showing him now?

Mr. Ehrlich: I am showing him No. 4 for Identification.

Q. Now, that is the same envelope, isn't it?

(Testimony of W. Harold Greene.)

A. The same envelope.

Q. The same envelope used by the Government, you say? A. Yes.

Q. You saw that? A. Yes.

Q. Now, let's see what would happen if I held it this way, let's see what happens if I hold it that way (demonstrating). So you said there must have been something in there because [283] this indicated to you it was something soft underneath, is that right? A. I said——

Q. Please, sir, didn't you say that?

A. Yes, that is right.

Q. Now, he held it like that (demonstrating)?

A. I don't know how he held it.

Q. Or like this (demonstrating)?

A. That would be—I wouldn't—he held it with his ring finger and the thumb. The weight was on the thumb.

Q. But you don't find any thumb prints?

A. Not a complete thumb print registered.

Q. Please——

Mr. Karesh: Let him answer the question.

Mr. Ehrlich: Just a moment. You don't find any thumb print, did you?

A. I just answered the question.

Q. Will you answer it again?

A. I said an incomplete register of the thumb.

Q. You never said that before?

A. Oh, yes, I did, it is in the record.

(Testimony of W. Harold Greene.)

Q. Pardon me, I am sorry. You wouldn't say that he picked the package up like that, would you (demonstrating)?

A. I wouldn't say he picked the package up like that with four or five fingers on the end.

Q. But you do say that he picked it up that way?

A. Yes.

Q. With those two fingers? A. Yes.

Q. Suppose, Mr. Greene, I were to pick up a package, pick up the envelope like that (demonstrating), or pick it up in any way, this type of envelope—you observe that these envelopes are absolutely the same envelopes, the size?

A. That is right.

Q. Now, my prints on there, how long would they last?

A. I would say your prints on there would last for probably four to five weeks at the most, under ordinary conditions, providing there was no other handling.

Q. Then your statement earlier that they would last two to three to four weeks has stretched now to five weeks? A. Not stretched.

Q. I mean you make it longer?

A. I say four to five weeks.

Q. Then they would disappear?

A. They would automatically be absorbed into the paper, because that paper is not a really hard sized paper.

Q. It is a soft paper?

(Testimony of W. Harold Greene.)

A. It is not a really soft paper, just what we call medium paper.

Q. And it is the oil from the hands that goes into the paper? A. Not the oil.

Q. What is it? [285] A. Perspiration.

Q. Perspiration? A. Yes.

Q. Not the oil? A. Not the oil.

Q. Well, the perspiration would have been gone, wouldn't it, in two, three, four to five weeks?

A. No.

Q. The perspiration would remain?

A. Under ordinary conditions, without handling many times, that is the case.

Q. Isn't it a fact that it is the oil that is covered with this substance that you people use, or powder, whichever you use, that sticks to that oil that gives you the print? A. It isn't oil.

(Pause.)

Mr. Ehrlich: I don't find it right now, I will go to another subject.

Q. Mr. Karesh asked you about transposition of a fingerprint from one piece of paper to another. Had you discussed that with him before?

A. Had I discussed the transposition?

Q. Yes, sir.

A. I told him that it couldn't be done thoroughly and successfully. [286]

Q. It can be done, though, can't it?

(Testimony of W. Harold Greene.)

A. It can be done, but not successfully. You don't do something if you don't do it successfully, in a case like this.

Q. But be that as it may, sir, it can be done, can't it?

A. It could be done, sure it could be done.

Q. Now, taking your photograph chart, here—Your Honor, may I step up?

The Court: You may.

Mr. Ehrlich: This is the latent print and this is the known print, correct, sir?

A. That is right.

Q. I call your attention to No. 12 here, where these complete clear circles—show me those complete clear circles there. Complete, now.

A. The complete innermost recurving ridge is right here.

Q. Just a moment, let's hold it up so these ladies and gentlemen can see it.

A. It is right there (indicating).

Q. Is there one direct line there, or is it all broken?

A. There is one direct line right there.

Q. That is broken, sir.

A. Where is it broken?

Q. That line comes up there, you have two little spots and it is broken.

A. As far as the classification is concerned and our technique [287] that is a complete ridge. Those are pores that you see there.

(Testimony of W. Harold Greene.)

Q. Mr. Greene, I merely inquired of you, if you will, please, to show me the same thing there, here (indicating). Now, this is your good, clear print.

A. That is right.

Q. And this shows them all broken.

A. No.

Q. Your latent print shows them all flat and straight, and in the known print——

A. It doesn't show them broken, at all. These are pores, and from the pressure exerted when the print was rolled——

Q. I am not an expert, sir, I only look at this picture, and I see those lines broken, and I see them over here complete and round, and here they are broken and drop off. You say that is the same?

A. I described that as the innermost recurving ridge of the pattern, the innermost recurving ridge of the pattern.

Q. But this latent fingerprint picture and the known fingerprint picture, just to a layman like myself, doesn't look the same, does it?

A. Well——

Q. Please.

A. It doesn't look the same to you for the simple reason you will get a latent print or a latent fingerprint from his natural touch or something, but still when you take someone's hands [288] and put pressure on them you won't get the natural touch. That is what I explained in the testimony I gave for the whole fourteen characteristics. I explained that to you—— [288a]

(Testimony of W. Harold Greene.)

Q. Yes, will you please not volunteer? You are an expert and I am not.

Mr. Karesh: Mr. Ehrlich, we will concede that, if you keep on saying it.

Q. (By Mr. Ehrlich): The fact remains, Mr. Greene, that these two pictures don't look alike, isn't that right, sir?

A. No, I don't say that they don't look alike, I should say not.

Q. They look alike to you, is that the point?

A. That is what I am testifying to, what they look like to me.

Q. Please. They don't look alike to you, is that correct? A. They do look alike to me.

Q. Well, there were twelve envelopes, were there not, submitted to you? A. There were not.

Q. How many were submitted to you?

A. Five.

Q. And what happened to the other four, that is, in so far as your investigation is concerned?

Mr. Karesh: You mean seven, counsel? What happened to the other four? He said he had five.

Mr. Ehrlich: He received five.

Mr. Karesh: There were twelve, that makes seven more.

Q. (By Mr. Ehrlich): Pardon me; maybe I misunderstood you. How many of these did you receive? [289] A. I received five.

Q. And one of those is Exhibit 31, is that right?

(Testimony of W. Harold Greene.)

A. That is right.

Q. Then you must have had four more?

A. Yes, sir.

Q. Were you able to ascertain who those four belonged to by means of alleged fingerprints?

A. No, I have no identifications on those, although I made comparisons.

Q. Calling your attention to 22, your initials are on that, sir?

A. In red, yes, sir.

Q. Yes.

A. Yes, sir.

Q. And calling your attention to 23, your initials are on that, are they?

A. That is right.

Q. In three places?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And this 22 has the same mark where the print is as has No. 31, doesn't it?

A. Let me see it.

Q. Some damage done there?

A. Something similar. [290]

Q. Yes, but the same nature and exactly in the same place in a straight line, isn't that right?

A. About, yes, that is right.

Q. Have you any idea what caused that?

A. I wouldn't know.

Q. Might it have been some fastening?

A. It may have been a stapling in that.

Q. And in stapling it, he put his hand underneath and between the package in order to put the print on that?

(Testimony of W. Harold Greene.)

A. He put his hand under the staple?

Q. This must have been fastened so this went exactly in the same place again——

A. Yes.

Q. Now, if all of these were fastened together, as apparently they must have been, how did he get his ring finger under here and put his thumb up on there?

A. He didn't buy them fastened together, did he?

Q. How do you know, sir? How do you know that he bought them?

A. If he handled them, he didn't handle them fastened together.

Q. How do you know that, sir?

A. Because it is too plainly seen by an expert.

Q. Do you now include in your qualifications what is plainly seen and what is not plainly seen?

A. I think my eyesight is pretty well.

Q. But all of these were fastened together?

A. I have no concern about whether they were fastened together or not. I didn't see them fastened together. I don't know anything about the fastening of them at all.

Q. And you don't know what was in the envelopes or whether they were or were not fastened together?

A. I know something was in them, but I don't know what it was——

Q. Wonderful. A. I didn't see it.

Q. Then, of course, you don't know whether they were fastened together as is indicated here or not, do you?

(Testimony of W. Harold Greene.)

A. It seems to me as though they were fastened together, but I didn't see it.

Q. It is a fact, isn't it, that you were directed to testify in the manner in which you are testifying? Isn't that right, sir?

A. I didn't get the question.

Mr. Ehrlich: Will you read the question, Mr. Reporter?

(Question read.)

A. No, sir.

Q. (By Mr. Ehrlich): Well, then, why have you been, sir, so anxious to volunteer a lot of information that has nothing to do with this case? Will you explain that? A. I haven't—

Mr. Karesh: Just a moment. I object to the form of that question—

The Court: Yes, sustained. [292]

Mr. Ehrlich: That is all, Your Honor; I have no further questions.

The Court: Any questions from other counsel?

Mr. Kernes: No questions, Your Honor.

Mr. Deasy: No questions.

The Court: Redirect?

Mr. Karesh: That is all.

Mr. Ehrlich: Oh, yes, pardon me, Your Honor, I overlooked a question which was suggested to me here.

Q. I show you, Mr. Greene, Exhibit No. 19, consisting of a number of cellophane packages, cello-

(Testimony of W. Harold Greene.)

phane wrappers, much discolored. Were they submitted to you?

A. No, these were not submitted to me, although I looked them over when I was here in January.

Q. Did you find any fingerprints on those?

A. No, I didn't.

Q. Did you find Mr. Stoppelli's prints on any of these? A. Not any of those.

Q. Just found it on that one envelope?

A. That is right.

Mr. Ehrlich: That is all.

Mr. Dunning: May I ask just one question, Your Honor?

The Court: Yes.

Q. (By Mr. Dunning): Mr. Greene, you made tests for prints on all of the five envelopes submitted to you, is that correct? [293]

A. I didn't make no tests.

Q. That is, you took prints from the envelopes?

A. I examined the envelopes.

Q. For prints?

A. For comparison purposes.

Q. I see. How many fingerprints in all did you find?

A. In all, in all those five envelopes?

Q. Yes.

A. There were three on one, two on another, and one or two on one of the other envelopes.

Q. Were there any fingerprints of Andrew Ingoglia submitted to you for comparison?

(Testimony of W. Harold Greene.)

A. The fingerprint card was submitted to me for comparison.

Q. Did you make any comparison of the other fingerprints you found on the envelopes with those of Andrew Ingoglia? A. I did.

Q. Well, did they match up?

A. No, they were not the same.

Q. They were not the same?

A. They were not the same.

Q. Otherwise, the fingerprints that you referred to belonged to some individuals not known to you?

A. Not known to me, that is right.

Mr. Dunning: That is all. [294]

Redirect Examination

By Mr. Karesh:

Q. And, Mr. Greene, we are still trying to find out who they belong to, aren't we?

A. That is right.

Mr. Karesh: That is all.

The Court: That will be all.

Mr. Karesh: May it please Your Honor, at this time the Government asks to offer in evidence as to all the defendants all the exhibits for identification.

Mr. Ehrlich: To which we object, Your Honor—does Your Honor want to hear argument?

The Court: Yes.

Ladies and gentlemen of the jury, I am going to excuse you now until two o'clock and you will ob-

serve the admonition in the meantime. You may now leave the courtroom.

(The jury retired from the courtroom.)

Mr. Ehrlich: Your Honor, with relation to the exhibits—I understand the motion is just as to the exhibits, is that correct?

The Court: Yes.

Mr. Karesh: At this time, then, I will make a motion as to the testimony.

Mr. Ehrlich: With relation to the exhibits, in so far as the defendant Stoppelli is concerned, we of course object to them.

We start off, of course, with the fact this is a conspiracy. [295] Now all of the testimony in this record, if we believe all of it, take it all as being true, all of the testimony in this record as against the defendant Stoppelli is that his fingerprint was on Exhibit 31. Now, that is all the testimony there is.

Any question about him or his participating here directly or indirectly has been cleared entirely by this testimony of Mrs. LeFevor, who testified that she saw the man who brought in the narcotics and that his name was Tony Sapoli, and she had visited with him. The only evidence against this man at all is a fingerprint which does not establish his conspiracy. A man must either do something directly, he must act, the evidence must show that he has done something, the evidence must show that he was part and parcel of it—and of course that doesn't mean

that he has to sit down and say to someone to do this, as I understand it, but it must show he has done something.

Let us take it for granted, Your Honor, that fingerprint is his and that he put it on the envelope. Does that mean he took the envelope and filled it with narcotics and gave it to the other defendants in this case? Does that mean that he ever handled the narcotics at all in this case? The only thing we have got there is one disconnected thing, a print.

Now, this envelope is the ordinary envelope, the same kind that the Government uses in their exhibits here, absolutely the same. This envelope may have been attached by him, I don't know, [296] but that doesn't indicate for one second his participation in any conspiracy. [296-a]

The Court: My answer to you on that is conspiracies must usually be established by circumstantial evidence, and it seems to me that that is a circumstance sufficient at least to go to the jury to determine the effect of it.

Mr. Ehrlich: May I respond for a moment, Your Honor? Where circumstantial evidence is used, the law is clear that it must be absolutely rationally inconsistent with the man's innocence.

The Court: I shall so instruct the jury. It is a question of fact for the jury to determine.

Mr. Dunning: In behalf of the defendant Ingoglia, I will object to the evidence offered by the Government on the ground that no sufficient foundation has been shown, and the evidence so far is in-

sufficient to connect the defendant Andrew Ingoglia with any of the exhibits that are now being offered in evidence.

The Court: Do any of the other defendants join in the motion?

Mr. Deasy: We will join in the argument. I will submit it without further argument.

Mr. Kernes: On behalf of the defendant McDonough, I join in the motion and submit it without further argument.

The Court: The ruling of the Court is that these exhibits which have been marked for identification are received as against all defendants for all purposes.

Mr. Karesh: May it please Your Honor, with reference to all [297] the testimony taken, we ask that all testimony taken prior to determination of the sale and the possession in the hotel——

The Court: That went in prior to October 31st?

Mr. Karesh: That is during October 31st and prior to that time, be admitted with one exception, and that is the conversation Mr. Souza had with Mr. McDonough about buying a car from Mr. Leeper. That should only go in as against McDonough. All the rest we ask to remain in against all the defendants.

Mr. Dunning: I will ask that the Court renew its ruling at this time with respect to the previous objections interposed on behalf of the defendant Ingoglia with reference to the conversations related by Agent White in connection with his conversation

with the defendant Ballard, and also the testimony of Agent McGuire, which was limited as to Ballard only, and the Court's ruling limiting the conversation to Souza as to the defendant McDonough. In other words, Your Honor, I am asking that Your Honor's rulings on my previous objections on behalf of the defendant Ingoglia, wherein the Court limited that testimony only to the defendants referred to, apply to this offer on the part of Mr. Karesh.

The Court: I am satisfied that in the state of the evidence as it presently appears that all of the testimony which was received for limited purposes should now be extended in so far as that testimony refers to conversations had between witnesses and defendants or concerning activities of defendants prior to [298] the termination of the conspiracy, which was on the 31st of October, with the exception, as counsel has pointed out, of the testimony of the witness Souza, that which he testified concerning the purchase of a car by—who was it, McDonough?

Mr. Karesh: McDonough told Souza he could get a car from Leeper.

The Court: Oh, yes.

Mr. Ehrlich: Your Honor, may I now renew my motion in so far as the evidence is concerned?

The Court: Very well. It will be so understood that the ruling of the Court is that all conversations and testimony concerning conversations in which the defendants or any of them participated in or

any activities and actions of any of the defendants occurring on or prior to October 31st is received in evidence as against all the defendants for all purposes, with the sole exception of the testimony referred to given by the witness Souza, in which he gave testimony concerning the purchase and sale of a Cadillac automobile between Leeper and McDonough, or rather, between Leeper and Souza.

Mr. Deasy: May the record indicate, Your Honor, that we had joined in that objection and Your Honor had overruled our objection?

The Court: It may be so understood.

Mr. Ehrlich: I have one other motion, Your Honor. I desire at this time to move for a mistrial on behalf of the [299] defendant Stoppelli based upon the statements made by the government witness Greene.

The Court: Well, it is unfortunate the statement was made. It was not a complete statement. It was an indication of something. I have instructed the jury to disregard it. I think that is sufficient.

Mr. Ehrlich: Of course, Your Honor, the old trial lawyer's statement that you can't unring a bell is particularly true here. This man could not have said in this trial that he has or has not a record involving this subject. It was clear that Mr. Greene deliberately and voluntarily put that in.

The Court: What do you mean by record? I think the intimation, in so far as it is an intimation, was that this man was under surveillance by narcotic officials.

Mr. Ehrlich: He went further than that. I do not have the exact wording, but as it struck me, and it struck Your Honor equally, with as much force at least, was that he conveyed to the jury the impression that there was something to this, that he knew all about this man, he knew exactly where to go to look, that they had a record on this man and with laymen, Your Honor, that makes a great deal of difference. It would not make any difference to you or to me or to perhaps others who have had experience with the trial of cases, but it does make a great deal of difference in the minds of people sitting on the jury. They can't weigh evidence as you weigh it or as I weigh it. [300] They can't mark out of their minds this thing that this man said. They can't put it away. We could do it. Your Honor could do it because you have tried so many cases. But this man's liberty depends upon what the jury does. That jury has now been told something that he could not get into evidence no matter how he tried.

The Court: He was stopped in his statement before he could complete it and it is not a completed statement. I think as far as the statement went, it is an indication he was under the surveillance of the narcotic bureau.

Mr. Ehrlich: Would Your Honor do me the kindness of reserving your ruling on that until I have that portion written?

The Court: Very well, and I will take it up with you at a quarter to two.

Mr. Karesh: I would like to say in this connection that in a sense counsel invited something that the agent, if he wanted to be unfair, could have answered when he said, "You were looking for——," the last question before the recess.

"You were trying to get him, weren't you?"

The Court: The statement was not made in response to that.

Mr. Ehrlich: No.

Mr. Deasy: Merely as to the conspiracy count, as to the defendants Ballard and Leeper, I urge the same objection. I move for a mistrial, as Mr. Ehrlich has previously urged, because in a conspiracy case if it is harmful to one defendant to show he was a dealer in narcotics, it is equally harmful to the other defendants involved. As to the substantive offenses, I do not believe that will apply.

Mr. Dunning: In behalf of defendant Ingoglia, I will make the same motion.

Mr. Kernes: In behalf of the defendant McDonough, the same motion, Your Honor.

The Court: We will reserve that until the testimony is available in transcript form. We will recess until 1:45 o'clock.

(Thereupon an adjournment was taken to 1:45 o'clock P.M. this date.) [302]

Afternoon Session, June 9, 1949

The Court: Now that all the counsel and defendants are present, I will hear from you further.

Mr. Ehrlich: Your Honor, I have the transcript

written up on that question and answer we were discussing. Mr. Karesh asked the question: "Now, how do you come to that conclusion that the print on the envelope is the print that belongs to John Stoppelli, the defendant?"

"A. We have a national book, every district supervisor in the country in the Narcotic Bureau has a national book published by the Narcotic Bureau of all the major known——"

and Mr. Karesh broke in:

"Just a moment. Pardon me.

"Mr. Ehrlich: All right.

"The Court: Yes.

"Mr. Karesh: Just a moment."

His answer was worse than I recalled it when I was making my motion: "We have a national book, every district supervisor in the country in the Narcotic Bureau has a national book published by the Narcotic Bureau of all the major known—," and, Your Honor, I suggest to you that that is a prejudicial statement. It is damaging to the defendant. It goes so far as to say, in answer to question, "How did you know that this print belonged to Stoppelli?," he says, "Well, we have a book in which all the [303] major known narcotic peddlers are registered or classified."

Mr. Karesh: He just did on "known."

Mr. Ehrlich: I will submit if the Court will read the actual words, that is more than merely hinting.

Mr. Karesh: I do not think so.

Mr. Ehrlich: He needed one word to complete it and that would be "peddlers."

The Court: Well, Mr. Ehrlich, you have got to bridge a gap of all the major known—. Of course you jump to the conclusion the jury is going to say, “all the major known individuals engaging in the narcotic traffic,” or some words to that effect.

Mr. Ehrlich: Well, he says it is printed by the Narcotic Bureau.

The Court: It might be all the major——

Mr. Ehrlich: Certainly it would not be people driving automobiles while drunk.

The Court: It might be anything. Don't you think that we have got to assume that a jury of twelve men and women who are sworn to try the case solely upon the evidence and upon the instructions of the Court that when the Court specifically, definitely instructs that jury to entirely disregard a statement of that kind, having in mind the statement is merely something you have to stretch to a conclusion that is not expressed by the witness—don't we have to assume that a jury is going to perform that solemn obligation in determining the guilt or innocence of a [304] defendant as the law request them to determine it?

Mr. Ehrlich: Your Honor, what you say is correct. We must assume that. But as I facetiously indicated this morning, without intending to be facetious, you can't unring a bell. You can't place your head and brain on the heads of twelve people who haven't the experience that Your Honor or these men who are engaged in this profession have.

These people, if they could weigh evidence as clearly as Your Honor would wish they could, we would have no problems. We would have to make no objections. We would have to make no motions to strike because Your Honor could instruct them that these are the issues, these are the facts, and this is what you are going to determine. But here you have to the layman the worst type of crime. To the layman the narcotic traffic is the worst crime. This is not selling alcohol. This is not running a still. This is not driving while drunk. This is not crawling through a window to burglarize some man's home. This is considered worse by the layman than is the crime of murder, the killing of a human being. They have a horror and fear and a basic scare of this.

Now, when you take that, Judge, and you permit a government witness voluntarily to say, "The reason I know that this is Stoppelli is because we have a book published by the Narcotic Bureau of all the major known—all the major known—" and then Mr. Karesh jumps in, and we start the discussion between counsel and the Court. This is an entirely different thing. Of course, [305] if he had said, "Well, I have some records," and we stopped him, that is one thing. Or, "I had occasion to look up some records," and we stopped him, that is another thing. But this man not only says how he knew it, but he qualifies it by saying every district supervisor's office in the country, every district narcotic supervisor's office has a book published, not by the

FBI, not by the State of California, or whichever state it was, but published by the Narcotic Bureau of all the well known—whatever the words are there, which brought us to the objections. It seems to me that that is going beyond the field of conjecture as to what the jury is going to do in following or not following the instructions of the Court. In other words, we have done here indirectly what the law will not permit us to do directly. We can not say why this man here has a record for narcotic peddling or whatever it is. We can't say that. The law says we can't do it.

The Court: He did not necessarily say, or the inference is not necessarily drawn, that he was referring to the major known dealers in narcotics. The major known sources of narcotics, the major known methods of distribution, sale, and so forth—we do not know what he had in his mind, and I do not think that sort of statement is sufficient to warrant a court in declaring a mistrial. I think the matter has been eradicated in the instruction I have given to this jury, and I am going to assume that the jury is composed of twelve fair and impartial men and [306] women with a conscientious determination to do their duty as they should do it. The motion for a mistrial will not be granted.

Mr. Ehrlich: Thank you, Your Honor, but without disputing it with Your Honor any longer, I was going to add one thing that occurred to me: When you take this statement and add it to the slight, very tenuous, very little, very thin, disconnected evidence

they have against the defendant Stoppelli, it may be the difference between his acquittal and his conviction.

The Court: Well, it is up to that jury to determine whether that is slim, unsubstantial bit of evidence or a substantial, strong evidence. That is up to the jury in considering their verdict under appropriate instructions.

Call the jury.

Mr. Ehrlich: I presume, Mr. Karesh, your case is entirely in now?

Mr. Karesh: Yes, we made our motion and the jury was excluded, about the admissibility of the evidence. When the judge tells the jury what his ruling is, we will rest.

The Court: I have made the ruling. I will just repeat it to them.

Mr. Karesh: They will know this is in evidence as against all the defendants.

Mr. Ehrlich: Your Honor, on behalf of the defendant Stoppelli, I now ask the Court that it direct the jury to return [307] a verdict of not guilty against the defendant Stoppelli.

The Court: Motion is denied.

Mr. Dunning: On behalf of the defendant Andrew Ingoglia, I now move the Court to make an order acquitting this defendant of the charge upon the basis of the insufficiency of the Government's case as it now stands before the Court.

The Court: The motion will be denied.

Mr. Karens: In behalf, if Your Honor please, of

the defendant Patrick McDonough, I make the same motion for acquittal based insufficiency of the evidence in the Government's case.

The Court: Denied.

Mr. Deasy: The same motion is made in behalf of the defendants Leeper and Ballard.

The Court: The motion is denied.

Mr. Ehrlich: The fact that I used the word "direct" instead of "advise," of course, does not make any difference.

The Court: I understand your motion, which will be considered make as such.

(Thereupon the jury returned to the courtroom and the following proceedings were in the presence of the jury:)

The Court: Ladies and gentlemen, there are a number of exhibits which were marked for identification and which were not received in evidence while you were present in the courtroom. All of the exhibits which were so marked have been in your absence admitted into evidence for all purposes. You will therefore [308] consider all of these exhibits to be in evidence. All evidence of the conversations or acts had and occurring on or prior to October 31, 1948, is evidence to be considered by you for all purposes against all the defendants, with the exception of the testimony of the witness Souza about a conversation which he states he had with

the defendant Ballard in reference to the purchase and sale of a Cadillac automobile.

Mr. Karesh: The defendant McDonough, Your Honor.

The Court: Strike the name Ballard. The defendant McDonough, with reference to the purchase and sale of a Cadillac automobile. That testimony is limited and is to be considered by you only as to the defendant McDonough, and to none of the other defendants. Evidence of conversations with or acts done by the defendant after October 31, 1948, is limited to the particular defendant, as I instructed you when such evidence was received. The acts or declarations of the defendant after October 31, 1948, is not evidence against any defendant other than the defendant doing the act or making the declaration. Now, as I understand——

Mr. Karesh: The Government rests.

Mr. Ehrlich: Your Honor, may the defendant Stoppelli enter into a stipulation with the Government through Mr. Karesh that the defendant Stoppelli was arrested on the 23rd day of December, 1948, under Commissioner's warrant No. 11-5177?

Mr. Karesh: If you say that is correct, we stipulate to it. [309]

Mr. Ehrlich: Thank you. So stipulated.

JAMES MARVIN BALLARD

a defendant herein, was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Deasy:

Q. What is your full name, please?

A. James Marvin Ballard.

Q. I am calling your attention to the defendant Stoppelli. I am referring to the gentleman seated in the courtroom to my extreme left inside the aisle. Before October 31, 1948, had you ever known Mr. Stoppelli? A. No, sir.

Q. Before October 31, 1948, had you ever seen Mr. Stoppelli? A. No, sir.

Q. Before October 31, 1948, had you ever heard of Mr. Stoppelli? A. No, sir.

Q. Calling your attention to defendant Leeper, did you know him on October 31, 1948?

A. I did, sir.

Q. Before that time, for how long a period of time had you known him?

A. Approximately six years.

Q. Calling your attention to the defendant McDonough, before October 31, 1948, did you know Mr. McDonough? [310] A. Yes, sir.

Q. And for a period of how long did you know him?

A. Approximately six or eight months.

Q. Before October 31, 1948, did you know a man whom you now know as Andy Ingolia?

A. I did, sir.

(Testimony of James Marvin Ballard.)

Q. Before October 31, 1948, how long had you known him?

A. In the neighborhood of four days.

Q. In the neighborhood of four days, is that correct?

A. That is correct.

Q. During the period of time that you had known Mr. Leeper, had you seen him frequently or infrequently? I will withdraw the question, and say within two weeks preceding October 31, 1948, did you see Mr. Leeper?

A. A few times I saw him on the street.

Q. In that two weeks you saw him a few times, is that correct?

A. That is correct.

Q. Where was it that you generally would see him?

A. Usually in Compton's restaurant, 12th and Broadway, Oakland.

Q. Two weeks before October 31, 1948, about how many times had you seen Mr. McDonough?

A. I didn't get that.

Q. Before October 31, 1948, did you see Mr. McDonough on any occasion?

A. A few occasions at the racetrack. [311]

Q. Would you see him any place else?

A. Occasionally I would see him around Louie's Bar at 12th and Franklin.

Q. Were your meetings with him casual or were they arranged?

A. They were casual.

Q. Calling your attention to the day that you saw Mr. Ingoglia, was he alone or was there someone with him when you saw him?

(Testimony of James Marvin Ballard.)

A. He was with Mr. McDonough.

Q. Where was it that you saw him?

A. At the racetrack.

Q. Approximately how long did you stay with him on that occasion?

A. In the neighborhood of 20 or 30 minutes.

Q. During that period of time did you generally discuss things with him?

A. Horses only.

Q. You discussed the horses, is that correct?

A. That is true, that is correct.

Q. On October 31, 1948, did you see Mr. Ingoglia again? A. I did, sir.

Q. Between the time that you first met him at the racetrack and between the time that you saw him on October 31, 1948, had you seen him on any other occasion?

A. I had spoke to him casually a couple of times on the street.

Q. Did you have any conversations with him or was it just casual? [312]

A. No, sir.

Q. Between the time that you first met Mr. Ingoglia at the race track and the time you met him on October 31, 1948, did you have any conversation with Mr. Ingoglia in reference to betting on horse races in which the name of Mr. Ingoglia figured?

A. I did, sir.

Q. Did you have one conversation or more than one conversation?

(Testimony of James Marvin Ballard.)

A. Two or three, to the best of my recollection.

Q. Can you tell me the location of any of them?

A. Well, one was in Compton's restaurant.

Q. About how long was that before October 31st?

A. That was approximately two days.

Q. Was there anyone else present at that conversation other than you and Mr. McDonough?

A. No, sir.

Q. As vividly as you can recall, will you tell us what the substance of that conversation was?

A. Well, we were broke—we were not broke, but we were not too well financially fixed. When Mr. McDonough told me Mr. Ingoglia would like to bet on horses. Mr. McDonough knew Mr. Leeper slightly and knew Mr. Leeper had a lot of information from San Francisco bookmakers on horses. So I talked to him about seeing if we couldn't get Mr. Ingoglia to make a bet on a horse and bet something for us.

Q. Did you know what Mr. Leeper's occupation was primarily? [313]

A. I did, sir.

Q. What was that?

A. He was a gambler and he was a dealer in the gold business.

Q. Did you have occasion to meet Mr. Leeper on October 31, 1948?

A. I did, sir.

Q. Where was it that you met him?

A. In Compton's restaurant.

(Testimony of James Marvin Ballard.)

Q. At that time did you have any conversation with Mr. Leeper? A. I did, sir.

Q. What did that concern?

A. It concerned a job.

Q. What was said by you and what was said by Mr. Leeper in that regard?

A. Previously Mr. Leeper had promised to take me to the Southern Pacific Yards, where he knew some people, to see if he could secure me a job on the railroad, and on October 31st, when I met him, which was Sunday, I asked him to take me down to see if he could do me any good in helping to secure me a job on the railroad. He told me he couldn't because the generator on his car wasn't working and the battery was dead.

Q. Was anything further said at that time?

A. No, sir. We walked out of Compton's restaurant, walked over to the garage where he keeps his car, and he asked the fellow who ran the garage to charge the battery on the car.

Q. I am calling your attention to Government's Exhibit No. 34, [314] a Cadillac automobile, license 17-K-120, and I will ask you if you will just look at that, please. Now, when you refer to Mr. Leeper's car, are you referring to that car?

A. That is it, sir.

Q. That is the car that you have in mind, is that correct? A. Yes, sir.

Q. After the battery was charged did you and Mr. Leeper go any place in his automobile?

(Testimony of James Marvin Ballard.)

A. We drove to the Clay-Ten Hotel and parked right on the corner at Tenth and Clay.

Q. Now, after you parked the car, did you attempt to do anything to fix the car?

A. I did, sir. I pulled the hood on Mr. Leeper's car and asked him if he had a screw driver, which he had in the automobile. The generator regulator was stuck and the juice wasn't going through the car. So I took the cap off the regulator, jiggled it a few times with a screw driver. I thought they needed filing. I asked Mr. Leeper if he had a fingernail file. He said he didn't have there. Mr. Leeper went upstairs in his room, opened the window. He didn't have a fingernail file, but he had a couple of emery boards, and he threw them out to me.

Q. When you refer to his room, you are referring to Room 306 in the Clay-Ten Hotel, is that correct?

A. That is correct.

Q. After working on the car, did you have occasion to go up [315] to Mr. Leeper's room?

A. I did, sir. I went up to Mr. Leeper's room to wash the grease off my hands.

Q. When you arrived there was Mr. Leeper alone or was there someone with him?

A. He was alone.

(Testimony of James Marvin Ballard.)

Q. Did you have any conversation with him at that time? A. I did, sir.

Q. Did you have any conversation with him at that time in regard to the job? A. Yes, sir.

Q. Tell us what was said about that.

A. He told me he would rather not drive the car, being as we couldn't fix it, to the Seventh and Pine Street to see if he could get me a job, because he was afraid the battery would go dead. In the meantime I brought up the subject that I would like to get a man to bet on a horse if he could get the horse, and the man might make a bet for us.

Q. What did Mr. Leeper say in that regard?

A. He said he could get a horse if I could get the man to bet on it.

Q. Was anything said then about your using Mr. Leeper's car?

A. Mr. Leeper asked me if I knew a place—it was a Sunday and he asked me if I knew a place where I knew he could get the regulator fixed on his car. I told him I didn't but I would [316] try to find one.

Q. Was there anything said about a meeting between this man to whom you referred and Mr. Leeper?

A. Mr. Leeper told me if I saw the man, to bring the man to his hotel and he would talk it over about what the bet would be.

Q. Then just tell us what you did.

(Testimony of James Marvin Ballard.)

A. I went downstairs. Mr. Leeper's car was parked at the corner of Tenth and Clay, where it had originally stopped. I got in his car, I drove up to Twelfth Street, and started down Twelfth Street, and I got one block past Broadway and Mr. McDonough was standing on the corner.

Q. Let me ask you at this point, the man that you were going to meet in reference to the bet on the horse, that was Mr. Ingoglia?

A. It was, sir.

Q. Did you know where Mr. Ingoglia lived?

A. I did not, sir.

Q. Then you met Mr. McDonough, is that correct?

A. That is correct.

Q. Did you have any conversation with Mr. McDonough?

A. I did, sir.

Q. Was there anyone else present other than you and Mr. McDonough?

A. There was not.

Q. Tell us as nearly as you can recall what was said.

A. I asked Mr. McDonough if he knew where Mr. Ingoglia lived, and he said he did. So I asked him to show me where he lived, [317] that I was going to try to get him to bet on a horse for Mr. Leeper and I. We drove out past the lake to Second Avenue, East Twelfth Street, and Mr. Ingoglia was standing on the corner walking along the street. He stopped and picked Mr. Ingoglia up and talked to him about making the bet on a horse, and he agreed to make a bet on the horse if he could secure some good information.

(Testimony of James Marvin Ballard.)

Q. From the Clay-Ten Hotel to Second Avenue and East Twelfth Street, approximately how far is that?

A. It is approximately, I would say a mile and a half.

Q. Did I understand you to say that you drove out Twelfth Street? A. That is correct, sir.

Q. From Clay and Twelfth out to Second Avenue and Twelfth, is that right?

A. I drove from Tenth and Clay to Second Avenue and Twelfth.

Q. Did you subsequently drive Mr. Ingoglia back to the vicinity of the Clay-Ten Hotel?

A. What was that?

Q. Afterwards, after you met Mr. Ingoglia, did you drive him down to near the Clay-Ten Hotel?

A. I did, sir.

Q. Who was with you when you did that?

A. Mr. McDonough.

Q. Just tell us as nearly as you can recall what you did after you picked Mr. Ingoglia up? [318]

A. After Mr. Ingoglia agreed to make a bet on the horse if we could secure some good information, we drove down Tenth Street and came directly to the Clay-Ten Hotel, parked nearly directly in the white zone in front of the hotel. Mr. Norris had something he wanted to do, so I told him to wait for me just a few minutes and I would take Mr. Ingoglia up, introduce him to Mr. Leeper, and I would be back. And I also told Mr. Ingoglia

(Testimony of James Marvin Ballard.)

I would return for him if I could get the car fixed.

Q. What happened after that?

A. We arrived in front of the Clay-Ten Hotel. I got out on the left side with the driver which was driving the car. Mr. McDonough was in the middle, as I recall, and Mr. Ingoglia was on the outside. Mr. Ingoglia and I got out, walked in the hotel, walked up the stairs, the third floor, started down to the end of the hall, where Room 306 is, and on the way toward Mr. Leeper's room I met someone in the hallway. Just before we arrived in Mr. Leeper's room Mr. White came charging out with a gun in his hand and stuck the gun into both of us, and he said, "I am a Federal Agent. Get in there." He forced us at the point of a gun into Mr. Leeper's room and made us sit on the floor.

Q. After that you were taken to jail, is that correct?

A. That is correct, sir, about twenty-five minutes later.

Q. While you were in the Oakland Jail did you have a conversation with Mr. White? [319]

A. I did, sir.

Q. Who was present at that conversation?

A. I think it was Mr. McGuire, and Mr. White.

Q. I am going to ask you if at that conversation you told either Mr. White or Mr. McGuire that you knew Mr. Ingoglia had narcotics?

A. I did not, sir.

(Testimony of James Marvin Ballard.)

Q. I am going to ask you if at that conversation you ever told either Mr. McGuire or Mr. White that Mr. McDonough had told you that Mr. Ingoglia handled narcotics? A. I did not, sir.

Q. I am going to ask you if, in that conversation, in substance or effect, you asked them if they would give you a break, or "What is there in it for me?"

A. I did not, sir.

Q. Will you state, as nearly as you can recall now, what the conversation was?

A. The next day in the Oakland City Jail—I went to jail Sunday afternoon. The next day Mr. White and Mr. McGuire came over, took me out of the main tank, took me into a small room, and was questioning me about what I knew about Mr. Ingoglia, Mr. McDonough and Mr. Leeper. I related the whole story where I met Mr. Ingoglia and all about it. And Mr. White said, "I guess you know what kind of a jam you are in."

I said, "I haven't done anything." I said, "I'm not [320] worried about it, too much."

There was no mention on my part of making any kind of deal with Mr. White.

Q. After that time were you taken to Mr. Karresh's office over here in the Federal Building, the Post Office Building, here?

A. The following Wednesday a United States Marshal came to the Oakland City Jail and brought me out of the Oakland City Jail and brought me to the Federal Building here in San Francisco. I

(Testimony of James Marvin Ballard.)

first was taken downstairs and had to wait by the fingerprint bureau a while, and then I was brought upstairs to Mr. Karesh's office.

Q. You were introduced to Mr. Karesh?

A. I was introduced to Mr. Karesh by Mr. McGuire.

Q. You had a conversation in that office, is that correct? A. There was, sir.

Q. Let me ask you this, who was present at that conversation?

A. Well, when we first came in there was another fellow sitting there. I don't know who he is. He was sitting behind the desk. He later left. He and Mr. Karesh were talking about betting on football pools at the outset. I think Agent Bertin was present in and out.

Q. At that time did you tell Mr. Karesh and Mr. McGuire, or either of them, that you asked them, "What is in it for me?"

A. I did not, sir.

Q. At that time you did have a conversation with Mr. Karesh, [321]

A. I did, sir. Mr. Karesh sent someone outside the room, secured some papers, and brought them back. He says, "Do you know anything about this deal?"

He said, "You tell me what you know and I will recommend that you receive probation."

He brought the papers back and laid them in front of me on the desk and told me the papers

(Testimony of James Marvin Ballard.)

showed where some fellow had been picked up on the street for peddling narcotics and he turned State's evidence and he received probation. And I told him I didn't want anything to do with it because I didn't have anything to do with the case and I wasn't worried.

Q. Can you recall any more of the conversation?

A. I recall bits of it.

Q. That is substantially what you recall now of the conversation you had, is that correct?

A. At one stage of it Mr. Karesh said that he would try to see that I got 25 years.

Q. What did you say to that?

A. I told him if he wanted to convict an innocent man, it would be upon his conscience, not mine.

Mr. Deasy: That is all.

Cross-Examination

By Mr. Karesh:

Q. Was Mr. McGuire present when I told you you would get 25 years?

A. I don't remember, sir. [322]

Q. You say you saw a man sitting at my desk and I was talking about betting on a football pool?

A. I think he is sitting in the courtroom right now, if I am not mistaken.

Q. What is the man?

A. I don't know. He looks like he may be your brother.

(Testimony of James Marvin Ballard.)

Q. Which one?

A. The fellow with the red tie and the white shirt.

Q. That one there (indicating a spectator)?

A. The one between those two.

The Spectator: Me?

Q. (By Mr. Karesh): The fellow who said "Me"? A. That looks like the man.

Q. He was sitting at my desk when we were talking about a football pool?

A. I wouldn't swear that that is the man.

Q. It looks like him?

A. Yes, considerably.

Q. He was sitting at my desk?

A. I don't know whether it was your desk. He was sitting at a desk.

Q. Will you tell me the conversation about the football pool?

A. I don't remember the exact circumstances about the football pool, but there was some conversation about some man winning so much on a football parley of some kind. [323]

Q. Did I use the word "parel"?

A. I don't know if you did, or not, but that was the substance of the conversation.

Q. Then you listened in on that conversation?

A. I must have. I was standing right in front of you, sir.

Q. Going back to this mysterious man in the corridor of the third floor of the Clay-Ten Hotel, will you describe that mysterious man to us?

(Testimony of James Marvin Ballard.)

A. I didn't pay any attention to him, sir. I don't usually pay attention to people that I meet by chance.

Q. How far down the hall was this man when you passed him in the hall?

A. He wasn't too far away from Mr. Leeper's door, sir.

Q. Would you say half way down the corridor to the elevator?

A. He was not quite half way, sir.

Q. You had seen him not quite half way?

A. He was closer to Mr. Leeper's room than he was to the elevator.

Q. Did he appear to be running, or just walking only? A. He was walking only.

Q. Did you tell that to me in my room in Mr. McGuire's presence, that you saw a man in the hall? A. I did not, sir.

Q. Did you tell that to the agents that day, October 31, 1948?

A. They didn't ask me, sir. [324]

Q. With reference to the automobile, you say that you got your hands dirty and that was why you went upstairs to wash your hands?

A. I did, sir.

Q. Where had you been before you started tinkering with the automobile?

A. I had just recently gotten out of bed.

Q. Didn't you say that before that time you had been in a garage and you had had the battery charged?

(Testimony of James Marvin Ballard.)

A. That was in between the time I got out of bed and the time we arrived at Tenth and Clay.

Q. So as I gather it, you got out of bed, took the car in the garage, and they charged the battery, and you drove the car to vicinity of Tenth and Clay Streets, and then Mr. Leeper went upstairs and he threw you down—what did he throw you down from upstairs?

A. An emery board.

Q. With the emery board you started working on what? A. The generator regulator.

Q. Why didn't you have the generator worked on or looked at when you had it in the garage?

A. The garage was only a storage garage.

Q. Storage for what?

A. Storage for automobiles.

Q. And yet they charge a battery? [325]

A. They do.

Q. Didn't you ask them to look at the generator?

A. I did, sir.

Q. Did they look at it?

A. No, sir. The man was only an attendant that puts gasoline in cars. I guess they must charge batteries; they have a charging battery machine.

Q. Did you pay for it?

A. I think Mr. Leeper had it put on his bill. He might have paid, though. I don't remember exactly.

Q. Do you know the name of the man in the garage? A. No, sir.

(Testimony of James Marvin Ballard.)

Q. Can you describe him to us?

A. He was a colored fellow.

Q. A colored fellow? A. That is right.

Q. And you say they were unable to work on the generator? A. That is correct.

Q. And yet they charged the battery for you?

A. That is correct, sir.

Q. The only reason you went up to the hotel the second time, or was it the first time, was to wash your hands?

A. I was only up to the hotel twice. The first time I washed my hands; the second time I came back with Mr. Ingolia.

Q. You are sure you went up there to wash your hands? [326]

A. That is correct, sir. I had grease all over my hands from taking off the regulator box.

Q. Did you stop in any other rooms in that hotel before you got to Room 306?

A. I don't know, sir. I don't know anyone else in the hotel.

Q. Your testimony positively is you went upstairs so that you could wash your hands?

A. That is correct, sir. [326-a]

Q. You heard Agent White and Agent McGuire testify that you had had a conversation with them in the jail the day after the arrest. You told them something about the narcotics. Do you deny that that conversation took place?

(Testimony of James Marvin Ballard.)

A. I do, sir.

Q. The conversation that Mr. McGuire related took place at my office, do you deny that that took place?

A. There was a conversation in your office.

Q. You deny that I went to the adjacent room and went through the experiment of putting the package through the door? Do you deny that that took place?

A. What you did in the next room, sir, I don't know.

Q. Didn't you see me in that same room in your presence go to the door and stick my hand through the door, so putting a package in in your presence?

A. I did, sir.

Q. Didn't we time how long it would take?

A. If you did, I guess you were performing an experiment. I didn't time it.

Q. After I said, "You want us to believe you had nothing to do with putting the package through the door?" Didn't you say, "It is ridiculous"?

A. I didn't say, "It is ridiculous."

Q. You didn't tell that to me or McGuire in my presence?

A. I never mentioned the word "ridiculous."

Q. Did you have any discussions with me about dismissing the case against you?

A. I did not, sir. You were the one who brought up the discussion.

Q. Didn't you say to me if I would drop the case

(Testimony of James Marvin Ballard.)

completely against you that you would tell the story? A. I did not.

Q. And didn't I refuse, in the presence of Mr. McGuire, to dismiss the case, and you said, "The hell with it. Let me get out of here."?

A. You didn't refuse to dismiss the case because I didn't ask you to dismiss it.

Mr. Karesh: That is all.

Mr. Dunning: No questions.

Mr. Deasy: No further questions.

Mr. Kernes: No further questions.

The Court: Is that all the evidence of the defendant Ballard? Have you any further witnesses for the defendant Ballard?

Mr. Deasy: No, the defendant Ballard rests.

Mr. Kernes: Call Mr. McDonough to the stand, if Your Honor please.

PATRICK JOHN McDONOUGH

was called as a witness in his own behalf and upon being duly sworn, testified as follows: [328]

Direct Examination

By Mr. Kernes:

Q. Would you state to the Court and the jury your full name, please?

A. Patrick John McDonough.

Q. Mr. McDonough, you are defendant in this action, are you not? A. I am.

Q. I am going to ask you if prior to the 31st

(Testimony of John Patrick McDonough.)

day of October 1948 you ever knew a co-defendant, John Stoppelli, the gentleman sitting on the extreme right? A. No, sir.

Q. Have you ever heard of Mr. John Stoppelli?

A. No, sir.

Q. Had you ever seen John Stoppelli?

A. No, sir.

Q. Did you have any knowledge of John Stoppelli? A. No, sir.

Q. Did you know the defendant Leeper, Raymond Leeper? A. Yes, sir.

Q. Did you know the defendant Ballard?

A. Yes, sir.

Q. Mr. McDonough, prior to October 31, 1948, how long had you known the defendant Ballard?

A. About eight months.

Q. Prior to that date, that is, October 31, 1948, how long had you known the defendant Leeper?

A. I would say about three months.

Q. I will ask you this, Mr. McDonough: Did you know the defendant Ingoglia, that is, Andrew Ingoglia? A. Yes, sir.

Q. Prior to October 31st, 1948, how long had you known the defendant Andrew Ingoglia?

A. I would say about ten months.

Q. About ten months? A. Yes, sir.

Q. Did you know prior to October 31, 1948, what the defendant Ingoglia's occupation was?

A. Card game.

Q. Where did you meet the defendant Ingoglia?

(Testimony of John Patrick McDonough.)

A. In a social club on Eddy Street in San Francisco.

Q. By social club you mean what?

A. Card room.

Q. Calling your attention to a few days prior to October 31, 1948, did you have occasion to be at the race track? A. Yes, sir.

Q. What track is that?

A. That is Golden Gate Field.

Q. In Albany, California? A. Albany.

Q. Did you have occasion at that time and place to see the defendant Ballard? [330]

A. Yes, sir.

Q. Did you have occasion at that time and place also to see the defendant Ingoglia?

A. I don't get you.

Q. Did you at that same time and place see the defendant Ingoglia? A. Yes, sir.

Q. Was there any conversation had between you and the defendant Ballard and the defendant Ingoglia at that time and place?

A. Yes, sir, about the horses, the way they were running.

Q. Will you just give me the substance of what that conversation was at that time and place?

A. All we talked about was the horses, how we were betting, how we were losing, how we were winning.

Q. Mr. McDonough, from that time until the

(Testimony of John Patrick McDonough.)

31st day of October 1948, did you see the defendant Ingoglia between that time? A. Yes, sir.

Q. Where did you see him next?

A. I seen him on the street, talked to him on the street.

Q. I will call your attention, Mr. McDonough, to Sunday, October 31, 1948, and ask you if during that day you saw the defendant Ballard.

A. Yes, sir.

Q. Where did you see him?

A. I was standing on the corner of Twelfth and Franklin Streets [331] when he drove up in an automobile.

Q. Did you have any conversation with Mr. Ballard at that time?

A. Yes, he stopped the car and he said——

Q. Just answer the question, Mr. McDonough. Could you give us now what you said and what he said as best as you can recall?

A. He stopped the car and said, "Do you know where I can find Ingoglia?"

I said I did. "He lives at the Lakeside Hotel."

And he told me, he said, "I am going to try to get a horse to bet on. Maybe he would bet some money on a horse."

Q. Was there anything else said by Ballard to you or by you to Mr. Ballard?

A. No, he said, "We'll take a ride and show him."

Q. Did you drive with Mr. Ballard?

(Testimony of John Patrick McDonough.)

A. Yes, I did.

Q. Where did you go?

A. Went to the Lakeside Hotel on Second Avenue.

Q. Did you meet Mr. Ingoglia there?

A. Yes, he was walking down the street. He happened to drive up.

Q. Was there any conversation had at that time?

A. Yes, Ballard told him he knew a fellow who had a good horse. Mr. Ingoglia said if the horse is good he might bet some money on it.

Q. Then what occurred?

A. Ballard said, "If you would come along, you could meet the [332] man who had the horse."

Mr. Ingoglia got in the car and rode back toward town.

Q. Ultimately did that car arrive in the vicinity of the Clay-Ten Hotel, that is, Tenth and Clay Street in Oakland? A. Yes.

Q. Was there any conversation as that car stopped at Tenth and Clay Streets between you, the defendant Ballard or the defendant Ingoglia?

A. Well, Ballard told me to wait, he would be down there in about five minutes.

Q. What occurred then?

A. Well, I waited.

Q. Did you see anything unusual?

A. No, sir.

Q. Did you leave that car? A. Yes, sir.

Q. Why did you leave that car?

(Testimony of John Patrick McDonough.)

A. I told Mr. Ballard I had an appointment in about 20 minutes to a half hour. I had to meet somebody. That is when he told me, "Wait five minutes and I will drive you back."

I waited 15 or 20 minutes. He didn't come, so I had to meet the party I had the appointment with. I left the car and walked back uptown.

Q. While you were sitting in that automobile, did you have occasion to see a police car drive up to the Clay-Ten Hotel? [333] A. Yes, sir.

Q. Did you have occasion perhaps a little later to see another police car drive up in the vicinity?

A. Yes, sir.

Q. At the time that those police cars drove up in the vicinity of the Clay-Ten Hotel, where were you? Were you in the automobile?

A. I was sitting in the automobile in the front seat.

Q. With relation to the time the police cars drove up to the vicinity of the Clay-Ten Hotel, how long a period elapsed before you left that automobile?

A. Well, one car came first and then another car came, and it was about 20 minutes after he went upstairs, I got out of the car, walked to the corner, lit a cigarette, and I figured, "I'm not going to wait for him," so I just walked back uptown.

Q. While you were waiting at that corner—what corner do you mean, sir? I will withdraw that. I will show you now United States Exhibit 13. You

(Testimony of John Patrick McDonough.)

say you walked to the corner. Was it the corner of Tenth Street or the corner of Eleventh Street?

A. This corner right here, Eleventh Street.

Q. That would be Eleventh Street?

A. Yes.

Q. Did you have occasion to walk around that corner?

A. Yes, I had to walk around the corner to go uptown.

Q. Did you ever look up or down Clay Street?

A. No, I took a few steps and glanced back to see if they were coming out.

Q. By they, whom do you mean, Mr. McDonough?

A. Mr. Ballard and Mr. Ingolia.

Mr. Kernes: I believe that is all.

Cross-Examination

By Mr. Karesh:

Q. Do you recall having a conversation with Agent Bertin of the Bureau of Narcotics?

A. No, sir.

Q. Don't you remember when you were being fingerprinted that he had a conversation with you in the marshal's office on November 15, 1948?

A. No, sir.

Q. Don't you remember Mr. Bertin asked you whether or not you knew any of the people and you said the only one you knew was Ballard?

A. No, sir.

(Testimony of John Patrick McDonough.)

Q. I will call your attention to page 180 of the transcript, which is the questions and answers of Mr. Bertin, and the answer is, speaking of your conversation with him, "that he didn't know any of these people that were arrested except Ballard."

"Q. He said he didn't know any of these people you had arrested except Ballard.

"A. Ballard."

Did you tell Mr. Bertin that? [335]

A. Mr. Bertin didn't ask me no questions at all.

Q. Are you positive of that?

A. Yes, sir.

Q. Do you recall seeing Mr. Bertin, when the information was being placed on the back of your fingerprint cards?

A. Mr. Bertin was the one, I think, who fingerprinted me in the presence of ten or fifteen people.

Q. And he said absolutely nothing to you?

A. No, sir, I don't recall him saying anything.

Q. And you are positive you didn't tell him the only person you knew that had been arrested was Ballard?

A. I didn't tell him nothing, sir.

Q. All right. Who was this appointment you made with on Sunday, October 31st, 1948, that you had to get to?

A. It was with a girl.

Q. What is her name?

A. Well, I met the girl at a dance.

Q. Do you know what her name is?

A. Usually I don't know—I don't know her last name. Her first name was Mary.

(Testimony of John Patrick McDonough.)

Q. How long before October 31st had you met her? A. Oh, about a week.

Q. When did you make the appointment for that Sunday? A. What is that?

Q. What time of day was the appointment for on that Sunday? [336]

A. I asked her the day before. I told her I would meet her on the corner the next day.

Q. What corner were you going to meet her on the next day?

A. Where Mr. Ballard picked me up at Twelfth and Franklyn Street.

Q. What time were you supposed to meet?

A. Between 5:00 and 6:00.

Q. 5:00 and 6:00? A. Yes.

Q. What time was it that you were at the hotel, outside of the car?

A. Well, I don't know. About—I think about 4:30 or so.

Q. Are you sure it wasn't before 4:00 o'clock?

A. I can't recollect the exact time.

Q. Does it take you an hour to walk from the Clay-Ten Hotel at Twelfth and Franklin? You had to go home to change your clothes?

A. No, I didn't go home.

Q. Why did you need an hour to get there?

A. I didn't want to miss her.

Q. What is that?

A. I didn't want to miss her.

Q. You didn't want to miss her? You are sure

(Testimony of John Patrick McDonough.)

you had an appointment? A. Oh, yes. [337]

Q. Will you describe this girl for us?

A. Weight and everything?

Q. As best you can, give us a description.

A. She is about five foot three, 115 pounds, black hair, she is Italian.

Q. She is what? A. Italian.

Q. Did you meet her at 5:30 that day?

A. No, sir.

Q. What happened?

A. She stood me up.

Q. Have you seen her since October 31st, 1948?

A. No, sir.

Q. You have not seen her since?

A. No, sir.

Q. And you say she stood you up?

A. Yes, sir.

Q. Do you remember Agent Grady testified that the police cars rolled up, you got out of the car, and went around the corner from the front entrance of the hotel, backed up, and then looked around again several times and backed up? Do you remember him testifying something to that effect?

A. Yes, sir.

Q. Did you do that, Mr. McDonough?

A. No, sir, I might have glanced back once or twice to see if [338] they were coming and that was it.

Q. Isn't it true, Mr. McDonough, when both of those police cars came up, the reason you ran away

(Testimony of John Patrick McDonough.)

or went away was because you knew something had gone wrong with the narcotic deal and you had better get yourself away from that hotel, isn't that true?

A. No, sir, I had no suspicions of any sort.

Q. Why didn't you go up to the hotel? You had an hour before you were going to meet this girl. Why didn't you go to the hotel, call Room 306 and tell them you were leaving?

A. Why should I?

Q. You left the keys in the car, didn't you?

A. It wasn't my automobile. I didn't drive it.

Q. You just left the keys in your friend's car, or Mr. Leeper's car, and went away?

A. Yes, I got out of the car and walked uptown.

Q. You didn't think enough of Mr. Leeper to go to the hotel and take the keys up to him so he would have those keys for his car, is that right?

A. I didn't notice the keys in the car.

Q. You moved into the driver's seat originally when Ingoglia and Ballard got out of the car, didn't you?

A. Yes, I think I did.

Q. And you didn't see any keys?

A. I wasn't looking for any keys.

Q. You are sure when you got out of the car you didn't see any [339] keys?

A. No, sir, I didn't even look.

Q. Where were you from October 31st, 1948, until you surrendered to the United States Commissioner in Oakland, I think it was on November 5. Where were you all that time?

(Testimony of John Patrick McDonough.)

A. Well, sir, the first time I knew was when I read the papers.

Q. When did you read it in the papers that there was a warrant for your arrest?

A. I think it was the following night, Monday night.

Q. Why didn't you surrender yourself to the authorities when you knew there was a warrant for your arrest?

A. Well, I was scared. I didn't do nothing, so I contacted an attorney.

Q. Whom did you contact?

A. Mr. Sperbeck.

Q. Then what happened?

A. He told me—I said, “I don't know if they are looking for me or not,” because my name wasn't in the paper.

Q. Wasn't the name McDonough——

A. No, I believe it was Norris.

Q. Why did you contact the lawyer if you didn't know they were looking for you?

A. The pictures were in the newspapers. My name was mentioned in the papers that I am involved. I figured I had better contact an attorney.

Q. You contacted a lawyer on what day?

A. I think it was Tuesday morning.

Q. How long after did you surrender yourself into custody?

A. He told me he would find out the details of what happened. And so arrangements were made for me to surrender myself on Saturday.

(Testimony of John Patrick McDonough.)

Q. You did not think you should have gone into the office of the Bureau of Narcotics and tell them you had nothing to do with this case, immediately upon reading your name in the paper?

A. I thought best to notify an attorney.

Q. Who did you say that attorney was?

A. Mr. Isaac Sperbeck.

Q. Sperbeck? A. Yes.

Q. Not Mr. Kernes sitting here?

A. No, sir.

Q. What names do you have? You have more than one name?

A. I don't. Some people started calling me another name.

Q. What is your real name?

A. Patrick John McDonough.

Q. What other name do you go by?

A. I don't go by——

Q. Didn't you go by the name of Red Norris?

A. Yes, but I didn't tell anybody it was my name. People just gave me the name. [341]

Q. When they gave you the name you accepted it?

A. No, sir, when people kept calling you that name, everybody else accepts that as your true name.

Q. In other words, as many people know you by the name of Norris as know you by the name of McDonough?

(Testimony of John Patrick McDonough.)

A. No, about 90 per cent more know me by Red Norris than know me by my right name.

Q. You stayed at Mr. Souza's house, didn't you?

A. Yes, sir.

Q. You didn't stay there from October 31st, 1948 up to November 5th, 1948, did you?

A. No, sir.

Q. Isn't that the reason you didn't stay, was because you knew the officers would be looking for you to pick you up for this offense?

A. I seen my name in the paper and I was scared. I didn't have nothing to do with anything. I figured the best I could do would be to contact an attorney.

Q. Tell me where did you sleep the night of October 31st?

A. I didn't sleep. I walked the streets.

Q. October 31st?

A. Oh, I am sorry. October 31st?

Q. Yes, that Sunday night.

A. Sunday night?

Q. Yes. Why did you walk the streets? [342]

A. I had nowhere to go. I was scared.

Q. But the warrant was not issued until the next day, Monday, and yet you were scared on Sunday night? A. Monday night, yes.

Q. Where did you sleep Sunday night?

A. Oh, Sunday night, I think I went to my home—no, I believe I stayed at a friend's house. That was Sunday night, yes.

(Testimony of John Patrick McDonough.)

Q. What is his name?

A. Well, a girl's house.

Q. Where does she stay?

A. She had a room in a hotel.

Q. What hotel? A. Touraine.

Q. And what is her name?

A. The name is Helen, as far as I am concerned.
I met the girl through a friend of mine.

Q. You mean you met a girl named Helen through a friend of yours, you do not know her last name, you stayed there Sunday night, October 31st, 1948?

A. That is right, sir. I know many people by their first names. I never can tell you their last name.

Q. Do you know what room you slept in in the Touraine Hotel?

A. No, sir. I met her in the bar that night and we both went to her room.

Q. You didn't go back to where you resided yourself on October [343] 31st? A. No.

Q. And you were not in your home up to the time you surrendered on November 5th?

A. The next night when I came back I bought the newspapers.

Q. And then you decided you had better keep under cover? A. No, I contacted an attorney.

Q. Didn't the attorney tell you to surrender yourself?

(Testimony of John Patrick McDonough.)

A. Yes, he would find out full details for me and then make arrangements for me to surrender myself.

Q. Where were you all these nights from November 1st to November 5th?

Mr. Kernes: If your Honor please, I am going to object to that. It is incompetent, irrelevant and immaterial. The witness has answered that he contacted an attorney.

The Court: It is beyond the scope of the direct examination. Sustained.

Q. (By Mr. Karesh): What is your occupation? A. Salesman.

Q. For whom?

A. My brother-in-law. He was in the household utensil business in San Francisco.

Q. Was that on October 31st?

A. No, sir, about four months prior to that we went broke.

Q. How have you been keeping yourself? [344]

A. Well, I saved a little money of my own by myself, and I am on a government pension.

Q. Did you say you went over to the hotel because it would be a bet on the horse?

A. No, sir. When he picked me up——

Q. Yes?

A. Mr. Ballard asked me where Mr. Ingoglia lived and I said I would get out. He said he would only be five minutes and "I will drive you back up."

(Testimony of John Patrick McDonough.)

Q. Weren't you interested in getting your cut on the horse if it won? A. What was that?

Q. Weren't you interested in getting your cut on the horse if it won, the horse the bet was going to be laid on?

A. I assumed I would get something.

Q. And yet you did not go up to the hotel room?

A. Well, no. Mr. Ballard told me to stay downstairs and he would be down in five minutes.

Q. Wasn't it worth sitting down there if you thought you would get some money?

A. No, I would trust Mr. Ballard.

Q. Do you trust Mr. Ingoglia?

A. Yes, sir, as far as that.

Q. You know Mr. Leeper, of course?

A. Yes, sir. [345]

Q. You have spoken to him over the phone and he has spoken to you over the phone?

A. No, sir.

Q. He has never called you at that Lockhaven number where the Souzas live and spoken to you over the phone? A. No, sir.

Q. On October 20th? A. No, sir.

Q. Your girl friend lived there in October, didn't she? A. Yes, sir.

Q. And you stayed there in October, didn't you?

A. Well, on and off.

Mr. Karesh: That is all.

Mr. Kernes: No further questions.

(Testimony of John Patrick McDonough.)

Q. (By Mr. Deasy): On this day in question, October 31st, 1948, did you see a package of any kind?
A. No, sir, I did not.

Q. You were seated in the car with Mr. Ingoglia and Mr. Ballard, is that correct?
A. Yes, sir.

Q. Where were you seated?

A. In the middle.

Q. Did you hear any discussion between Mr. Ingoglia and Mr. Ballard about a package?

A. No, sir. [346]

Mr. Deasy: I think that is all. Thank you, Mr. McDonough.

Mr. Dunning: No questions.

Mr. Ehrlich: No questions.

The Court: That will be all.

Mr. Deasy: May it please the Court, the defendant Leeper rests.

Mr. Dunning: On behalf of the defendant Ingoglia, your Honor, the defendant Ingoglia rests.

Mr. Ehrlich: Your Honor, I have instructed my client to rely upon the condition of the evidence as it now stands and the defendant Stoppelli rests.

Mr. Karesh: Just a minute now. That statement, "I have instructed my client to rely—" what is that? Does the defendant rest?

Mr. Ehrlich: I said that, Mr. Karesh.

Mr. Karesh: Under your instruction?

Mr. Ehrlich: That is correct.

The Court: Any rebuttal?

Mr. Karesh: No.

The Court: Both sides rest. The Court and counsel were discussing during this noon hour the matter of argument. Now, I understand that all counsel are in agreement that it is satisfactory that the argument be taken up tomorrow and that each side, the Government on the one side, and the defendants on the other side, are allotted two hours for argument, defense counsel [347] to divide it as they see fit. I also understood Mr. Karesh to say that possibly he would not require two hours, in which event he would be considerate enough to counsel for the defense to let them have a little of his time.

Mr. Karesh: I will.

The Court: With that understanding, we will adjourn the case, as far as the jury is concerned, until tomorrow morning at 10:00 o'clock. I would ask counsel to remain for a few minutes.

(Thereupon the jury retired from the courtroom and in their absence the following occurred:)

The Court: Gentlemen, I wanted you to remain here briefly for the purpose of mentioning to you the proposed instructions. I, of course, will instruct the jury as to the substance of these three counts and I will also instruct them as to the pertinent provisions of the Harrison Narcotics Act, the Jones-Miller Act and also the Federal statutes relating to conspiracy, the usual instruction in that regard given in these cases.

I will instruct them on the presumption of innocence and the doctrine of reasonable doubt, the usual instructions of the method of evaluating testimony, the instructions as to the functions of the jury and that of the Court, with which counsel are quite familiar. The Government submitted to me an instruction upon the matter of entrapment. I will give that instruction. I will instruct them generally on the matter of conspiracy, not [348] entirely, probably, in the form the instructions are proposed by the Government set forth, but substantially the same. I will instruct them that the oral admissions of the defendants should be received and considered by the jury with caution.

Are there any other matters that counsel wish to mention to the Court in connection with the instructions?

Mr. Ehrlich: The only one I think of at this moment is the right of the defendant to rely on the state of the evidence.

The Court: Yes, I will instruct the jury that a defendant may rely on the evidence or lack of evidence and he is not required to take the stand and testify, and the fact that he does not take the stand and testify can not be used against him.

Mr. Ehrlich: Then, as to the defendant Stoppelli, the instructions covering circumstantial evidence——

The Court: Yes, I will give that instruction. I will instruct them that the circumstances must be consistent with the guilt of the defendant and in-

consistent with any reasonable theory of his innocence and must show his guilt beyond a reasonable doubt before the jury can return a verdict based upon circumstantial evidence.

Mr. Ehrlich: I do not think of any more instructions, but if they do occur to me,—may I suggest them to your Honor tomorrow?

The Court: Yes, either tomorrow or Monday.

Mr. Karesh: Your Honor, we will withdraw the request for [349] instruction on entrapment, because nobody has taken the stand and said they were entrapped.

The Court: It is a question of what one testifies to by way of entrapment. It is a question whether or not the evidence requires the giving of such an instruction. I believe it is a matter for the jury to decide whether there was or was not entrapment under the facts of this case and I propose to give the instruction on entrapment.

Mr. Deasy: Under the general instructions, will your Honor give one that mere presence at the scene of the crime and mere opportunity to commit the crime——

The Court: I think that is unnecessary in view of the instruction upon reasonable doubt.

We will adjourn until tomorrow morning.

(Thereupon an adjournment was taken in the above-entitled case until tomorrow, Friday, June 10, 1949, at 10:00 o'clock a.m.) [350]

Afternoon Session, Monday, June 13, 1949

Charge of the Court

The Court: Ladies and gentlemen, under the law and judicial process in the Federal Courts, a person accused of crime is entitled to trial by a jury.

In the performance of that important function you may not act arbitrarily or capriciously. Since ours is a government of laws and not of men, it is your duty to comply with and obey the legal principles, and those legal principles it is my duty to give to you.

It is your duty to decide all the questions of facts that have arisen in the trial of the case. You are to decide, of course, the ultimate facts of the guilt or innocence of these five defendants.

You are expected to perform this duty calmly and dispassionately, without any feeling of rancor or prejudice against counsel or against the defendants or against any of the witnesses who have testified in the trial of the case.

In determining the issues of fact in the case it is your duty to decide what credence you are to put in the testimony of the various witnesses who have testified. That is exclusively your duty. I have nothing to do with the determination of these questions of fact.

Likewise I have a duty as a Judge of the Court to give you [351] the principles of law which are to govern you in your deliberations. As I do not

trespass upon your province, neither can you trespass upon mine. It is your duty to take these principles of law as I give them to you and apply them even though you may not agree with them or you may feel that they are not good law, nevertheless it is your duty to accept them and apply them.

Now there are certain rules which apply to all criminal cases. I give them to you to aid you in determining the weight of the evidence in the case and how you should adjudge the evidence.

In the first place, it is your duty to approach the case and come to your decision without any sympathy on the one hand and without any passion or prejudice on the other. You must decide the case purely upon the evidence received in the trial of the case. That evidence includes the sworn testimony of the various witnesses and the exhibits which have been received in evidence, also the stipulations which have been entered into in open court between counsel.

If, perchance, you have read anything in the newspapers, or have heard or received any information outside of the trial of the case bearing upon the case, all such matters are extraneous. You must not take countenance of them. You must not permit them to play any part in your deliberations.

At the time of the impanelment of the jurors, I told you [352] that the filing of the indictment in this case raises no presumption of the guilt of the defendants or either of them. I at that time told

you that it was a principle of law which must govern you that the defendants, and each of them, are presumed to be innocent, and they must be presumed to be innocent throughout the trial of the case. It devolves upon the prosecution, the government of the United States in this case, to submit to you that degree or quality of evidence which overcomes that presumption of innocence and convinces you to a moral certainty and beyond a reasonable doubt of guilt. If the proof does measure up to that degree, of course, your verdict will be guilty. If the proof does not measure up to that degree and if you entertain a reasonable doubt of guilt, it will be your duty to return a verdict of not guilty.

Each of the defendants in this case is entitled to the independent judgment of each juror.

You will observe, as you have been told during the trial of the case, and you will observe from other instructions which I give to you, that the defendants on trial here are jointly charged in counts one and two and that they are charged in the last count with having conspired together to violate laws of the United States. Now it goes without saying, of course, that though all the defendants are charged jointly, yet the guilt or innocence of each defendant must be determined by the jury separately as to each count. Each defendant has the same rights [353] as though he were being tried alone.

In the course of these instructions the words "defendants" and "defendant" will, for sake of

economy, be frequently used. It will be understood that each defendant is thus specifically referred to, and any instructions given referring to “defendants” or “defendant” generally, will be understood and considered by you as referring to each defendant separately and individually.

There are some standards which you may take into account in weighing the evidence in the case. One of the basic principles is that you can not bring in a verdict of guilty unless you are convinced beyond a reasonable doubt of the guilt of the defendants.

What is meant by a reasonable doubt? A reasonable doubt is what the term implies. It is a doubt based upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be imaginary or fanciful, or one that is perhaps captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. In this case, if, after you have considered the evidence, you have such a doubt in your mind as would cause you or any other reasonable or prudent man or woman to pause or hesitate in some act of grave concern in your own lives, then you would have such a doubt as the law contemplates is a reasonable doubt. While none of the defendants in this case can be convicted unless his guilt [354] of the offenses charged is proved beyond a reasonable doubt, the law does not require a demonstration,—that is, such a degree of proof as, excluding the possibility of error, produces abso-

lute certainty, because such proof in any case is rarely if at all possible. Moral certainty alone is required, that degree of proof which produces conviction in an unprejudiced mind.

Whether or not you believe the witnesses who have testified in this case and the weight that is to be attached to the testimony given by them is a matter for your exclusive judgment. In this case, as in all cases, we start out with the presumption that the witness is presumed to speak the truth. When a witness takes the stand we begin with the presumption that he is there to tell the truth. However, this presumption may be negatived in several ways. It may be negatived by the manner in which he testifies, by the character of his testimony, by contradictory evidence, by his motives. In passing upon the credibility of the various witnesses who have testified here on the witness stand in this case you may accept all or any part of their testimony, or you may discard or reject all or any part of the testimony of any witness. If it has been demonstrated to you during the trial of the case that any witness has testified falsely, it is your right to reject all of the witness' testimony, to distrust it, and not to consider it. You are not to be swayed by the fact that maybe there is a larger number of [355] witnesses on one side of the case than on the other. It is not the number of witnesses that determine the weight of the evidence, but it is the credibility of the witnesses who testified that is the decisive factor in determining the amount of weight you wish to attach to the testimony.

In order to evaluate the worth of the testimony that is presented to you, you may consider many factors: You can consider the circumstances under which the witness has testified, the demeanor or manner of the witness on the witness stand, his intelligence, the connection or relationship that he bears to the Government or to the defense, the manner in which he might be affected by the verdict, the extent to which he is corroborated or contradicted by other evidence, if at all, and any matter that in your view, reasonably, considering all the evidence, bears upon his credibility.

Now counsel have a right, and indeed it is their duty, to argue the case to you, and it is your duty to listen and to be attentive to and give weight and consideration to the arguments of the counsel. However, in their comments upon the facts of the case, if you find that there is any discrepancy between what they stated to you to be the facts of the case and the words that have come from the mouths of the witnesses, you must disregard, if there is such conflict, the statement as to facts made by the attorneys and consider only the evidence given by the witnesses in that regard. [356]

It is possible in this case, as it is any other case, that there may be some discrepancies in the testimony. It is conceivable that there may be minor discrepancies in the testimony of the witness or between the testimony of one witness and that of another. It is your duty not to pay attention to such minor discrepancies unless they reasonably

bear upon the guilt or innocence of the defendants or any of them, and if such discrepancies do bear upon the guilt or innocence of the defendants, then, of course, you should consider them.

Any fact may be proved by the testimony of but one credible witness and you may find a verdict upon the testimony of only one witness whom you believe testified truthfully even though a greater number of witnesses may have testified to the contrary, provided you believe that the testimony of the single witness is, with reference to its credibility and reliability, of greater weight than that to the contrary. You are not bound to believe the testimony of any particular witness unless in your opinion it is worthy of belief under the test mentioned for determining the credibility of witnesses, as stated to you in these instructions.

The opinion of an expert must be *weight* carefully. The weight to be given to such opinion should be estimated by considering the experience and learning of such witness, and the convincing logic of the reasons given in support of his conclusions. You are to consider the proof of definite facts, such as you believe are established by the evidence, and you may [357] disregard any opinion of any witness if you believe it to be contrary to the proved facts, or, though uncontradicted, you find it to be unreasonable.

At times during the trial of the case the court has asked questions of several of the various witnesses who have testified. You are not to infer from

this fact that the court has any leaning one way or the other as to the guilt or innocence of the defendants, or either, or any of them. Such questions as the court has asked have been asked pursuant to the authority, and indeed the duty, of the court to expedite the trial and to assist in bringing before the jury pertinent information for their consideration.

The fact that a defendant has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any presumption of guilt or any unfavorable presumption or inference because he has not testified in his own behalf.

Under our law a defendant is entitled to take the stand or not as he chooses, and under our Constitution no man is compelled to be a witness against himself. No presumption whatsoever is to be indulged against him because he does not take the stand.

A defendant may testify in his own behalf. In doing so he becomes a witness in the case. His testimony, therefore, must be treated according to the same standards that apply to [358] the testimony of any other witness. In addition, you may consider the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as the result of your verdict.

Where the evidence is susceptible to two reasonable inferences, one pointing to the guilt and the other to the innocence of a defendant, the jury

should adopt the one of innocence and find him not guilty.

Evidence stricken by the court must be entirely disregarded by you and you must treat such evidence as if you had never heard or seen it.

You are instructed that the testimony of an accomplice or a co-conspirator, or evidence of oral admissions of a defendant ought to be received by you with caution.

There are two classes of evidence recognized and received in courts upon either of which a defendant may be convicted of crime. One is direct evidence and the other is circumstantial evidence. When a witness testifies as to what he perceived through his own senses, that is direct evidence. All other evidence is circumstantial evidence. Before you may find a defendant guilty upon circumstantial evidence, the circumstances must be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of his innocence, and must show his guilt beyond a reasonable doubt.

The court charges you that evidence admitted for a limited purpose is to be considered by the jury for such purpose, and [359] none other. Under this rule, it is the duty of the jury, when the propositions of fact to which such evidence is addressed are limited, to exclude such evidence from their minds as to all other questions of fact in the case.

These ladies and gentlemen, are some of the general rules that apply in all criminal cases and

should be of assistance to you in determining the credibility of the witnesses and the weight to be attached to the testimony.

The indictment in this case is in three counts.

In the first count of the indictment it is charged that the defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, on or about the 31st day of October, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, heroin, in quantity particularly described as 12 envelopes, containing approximately 10 ounces and 436 grains of heroin.

In the second count of the indictment it is charged that the defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at the same time and place mentioned in the first count of the indictment, did fraudulently and knowingly conceal and facilitate the concealment of the same quantity of heroin, as described [360] in the first count.

In the third count of the indictment, it is charged that the defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at a time and place to said Grand Jury unknown, did conspire together and with other persons whose names are to said

Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violations of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendants then and there well knew, in violation of Section 174 of Title 21 United States Code; that thereafter and during the existence of said conspiracy one or more of said defendants, hereinafter mentioned by name, in the City of Oakland, County of Alameda, State of California, within said Division and District, did the following acts in furtherance thereof and to effect the objects of the conspiracy aforesaid:

1. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant Raymond A. Leeper had a conversation with George H. White, District Supervisor of the Bureau of Narcotics of the United States Treasury Department, in Room 306 of the [361] Clay-Ten Hotel, 1014 Clay Street.

2. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant James Marvin Ballard left the Clay-Ten Hotel, 1014 Clay Street, entered a 1941 Cadillac automobile, California License Number 17-K-120, parked in the vicinity of the said Clay-Ten Hotel, 1014 Clay Street, and

drove the said automobile away from the said vicinity of the said Clay-Ten Hotel.

3. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the said defendant James Marvin Ballard drove the said 1941 Cadillac automobile, California License Number 17-K-120, to the vicinity of the Clay-Ten Hotel, 1014 Clay Street, with the defendants Andrew Ingoglia and Patrick John McDonough as passengers in said automobile.

4. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendants James Marvin Ballard, and Andrew Ingoglia left the said 1941 Cadillac automobile, California License Number 17-K-120, and entered the said Clay-Ten Hotel, 1014 Clay Street.

5. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, immediately after the defendants James Marvin Ballard and [362] Andrew Ingoglia left the said Cadillac 1941 automobile, California License Number 17-K-120, and entered the said Clay-Ten Hotel, 1014 Clay Street, the defendant Patrick John McDonough sat in the driver's seat of the said automobile.

6. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the said defendants James Marvin Ballard and Andrew Ingoglia stood

in front of the closed door of room 306 of the Clay-Ten Hotel, 1014 Clay Street.

7. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, the defendant Raymond A. Leeper opened the door from the inside of Room 306, at the Clay-Ten Hotel, 1014 Clay Street, and received a package from the defendants James Marvin Ballard and Andrew Ingoglia, who were then and there standing outside of said door.

8. On October 31, 1948, in the City of Oakland, County of Alameda, State of California, within said Division and District, immediately after the defendants Raymond A. Leeper received the package from the said defendants James Marvin Ballard and Andrew Ingoglia, the said defendant Raymond A. Leeper shut the door of Room 306 and remained inside of the said Room 306 of the Clay-Ten Hotel, 1014 Clay Street, and the said defendants James Marvin Ballard and Andrew Ingoglia remained in front of the door outside of the said Room 306 for a short period of time. [363]

The first count of the indictment charges the defendant with violating an act of Congress known as the Harrison Narcotic Act, which provides as follows:

“It shall be unlawful for any purpose to purchase, sell, dispense, or distribute any of certain drugs, including heroin, except in the original stamped package or from the original stamped

package; in the absence of the appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found.”

The second count of the indictment charges these defendants with violating an act of Congress known as the Jones-Miller Act, which provides, in part, as follows:

“If any person fraudently or knowingly conceals, or in any manner facilitates the concealment of any narcotic drug after being imported or brought into the United States, knowing the same to have been imported contrary to law, such persons shall upon conviction be punished as the law provides.”

The third count in the indictment charges the defendants, Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, with conspiracy to violate the Harrison Narcotic Act and the Jones-Miller Act, in violation of Title 18 U.S.C., Section 371, which latter act [364] which provides in pertinent part as follows:

“If two or more persons conspire either to commit any offense against the United States, and one or more such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law.”

The flight of a person after commission of a crime and before arrest is insufficient of itself to establish guilt, but if proved, is a circumstance to be

considered with other circumstances in the case in determining his guilt or innocence.

Although the first and second counts of the indictment charge the defendants with the sale and concealment of approximately 10 ounces 436 grains of heroin, it is not necessary for the government to prove that this exact amount was sold or concealed. Proof beyond a reasonable doubt and to a moral certainty that any quantity of heroin was knowingly and intentionally sold by defendants as alleged in the first count is sufficient to sustain a conviction under that count and proof to that degree that defendants knowingly and intentionally concealed any quantity of heroin as alleged in the second count is sufficient to sustain a conviction under the second count.

In every crime there must appear a joint operation of acts and intent.

To sustain a conviction under count 3 of the indictment, it is not necessary to show that the defendants, or either of them, did feloniously conspire to violate both the Harrison Narcotic [365] Act and the Jones-Miller Act. Proof beyond a reasonable doubt and to a moral certainty that the said defendants did unlawfully conspire to violate either the Harrison Narcotic Act or the Jones-Miller Act as alleged is sufficient to sustain a conviction under count 3 of this indictment, but before you can find a verdict of guilty under the third count, all twelve of you must be convinced beyond a reasonable doubt that the defendants conspired as alleged to violate one or both of said acts.

Referring to the charge contained in the first count, it is unlawful for any person to sell heroin except in or from the original stamped package.

In this connection, you are instructed that the Harrison Narcotic Act provides that proof by the government of the absence of appropriate tax paid stamps from the package containing the heroin in question is sufficient to place the burden on the defendant proved to be in possession of the heroin of establishing the fact that such heroin was actually sold, dispensed or distributed in or from a package bearing the proper internal revenue stamps.

Thus the absence of appropriate tax paid stamps from any package containing heroin which is sold, dispensed or distributed, is prima facie evidence of a violation of the Harrison Narcotic Act by the person possessing such package. Prima facie evidence is that which suffices for the proof of a [366] particular fact until contradicted and overcome by other evidence. The jury is to bear in mind, however, the principle of law that is defendants be not found guilty of an offense unless the jury is convinced of the guilt of the defendant of such offense to a moral certainty and beyond a reasonable doubt.

With reference to the charge in the second count, you are instructed that any person who fraudently or knowingly conceals or in any manner facilitates concealment of a narcotic drug, knowing the same to *be have* brought into the United States contrary to law, is guilty of a felony.

The law provides that the term "narcotic drug" shall include heroin.

The law further provides that when on trial for concealing or facilitating the concealment of heroin the defendants are shown to have had possession of such heroin, such possession shall be deemed sufficient evidence to authorize the defendants' conviction unless the defendants explain their possession to your satisfaction.

Therefore, if you are convicted from the evidence, to a moral certainty and beyond a reasonable doubt that the defendants now on trial had heroin in their possession on the occasion charged in the second count of the indictment, and intentionally and knowingly concealed, or facilitated the concealment of such heroin, you will find the defendants guilty unless they have explained their possession of the heroin to [367] your satisfaction.

On the other hand, and if you are not convinced to a moral certainty and beyond a reasonable doubt, or if the jury entertains a reasonable doubt that the defendants had heroin in their possession on the occasion charged in the second count and intentionally and knowingly concealed or in some manner facilitated the concealment of such heroin, you will find the defendants not guilty.

The Government is permitted to use informers to assist in the enforcement of the law and to present the opportunity to violate the law to a person believed to be engaged in the commission of crime.

The Government need not produce such informer as a witness in the trial of a case in which the informer assisted the Government.

Where the officers of the law have incited a person to commit a crime charged and lured him on to its consummation with the purpose of arresting him, the law will not authorize a verdict. But if the intent and purpose to violate the law are present, the mere fact that public officers furnish the opportunity is no defense. The Government is not engaged in the business of manufacturing criminals; it has enough to do to prevent the commission of crime. But it often becomes necessary for Government officers and agents to match their wits against the wits of the man who is deliberately violating the [368] law or who has violated the law and in such a case the officers or agents may afford him an opportunity to commit a crime.

If a man is engaged and prepared to break the law the mere fact that employees of the Government put it in his power to break it and thereby capture him in the act of breaking it does not constitute an entrapment and is no defense. If, however, a man has no disposition to break the law, and would not break it except he was induced and persuaded therein by the Government, then that does constitute entrapment and would be a defense warranting an acquittal of the crime charged.

It is the law that whoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets, counsels, encour-

ages, commands, induces or procures its commission, is a principal. In this connection, if you find that one defendant did not directly commit any or all of the offenses charged in the indictment, but did aid and abet, or counsel, or encourage, or command, or induce, or procure the commission of any or all of such acts, you will find such defendant guilty of the offense which he so aided, abetted, counseled, encouraged, commanded, induced or procured the commission of.

A person who commits a crime though the agency of another with whom he has arranged for assistance in the commission of the crime, is as guilty in the eyes of the law as if he had committed the crime himself personally without such assistance.

Whoever directly commits any act constituting an offense defined in any law of the United States, or whoever *aid*, abets, counsels, induces or procures its commission is a principal and to be prosecuted and punished as such. In other words, whoever directly does the thing that is a violation of law is a principal as is also one who either aids, abets, counsels, induces, or procures the doing of that act.

“Aid means to help, support, assist; one who helps or promotes in doing something; a helper or assistant.

“Abet” means to instigate or encourage by aid or countenance; to contribute; as an assistant or instigator in the commission of an offense.

It is essential to the guilt of a person charged

with aiding and abetting the commission of the crime, that such person's acts shall have contributed to the effectuation of the offense. It is sufficient if it facilitated the result and rendered the accomplishment of the offense more easy.

Usually, to aid and abet in the commission of an offense the person rendering such aid or assistance is present, to render support and confidence, but he may aid, abet, if absent.

A person who knowingly renders assistance, cooperation and encouragement in the commission of an offense is one who aids and abets in the commission.

I instruct you that a prosecution for conspiracy may be maintained either at the place where the conspiracy was formed, [370] or where one or more of the overt acts took place. One physically without the jurisdiction may be a party to a crime therein. If a crime is committed in the Northern District of California, the commission of which crime has been aided and abetted by another outside the jurisdiction of the Northern District of California, the aider and abetter is liable as though he had actually committed the crime in the Northern District of California.

Unless you find beyond a reasonable doubt, or if you entertain a reasonable doubt that a defendant knowingly and intentionally committed the offense alleged, or knowingly and intentionally did something to aid or abet the other defendants, you may not find him guilty of such offense.

The law under which the third count of the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty.

In order to establish the crime charged, it is necessary, First, that the conspiracy or agreement to commit one or both of the particular offenses against the United States as alleged in the indictment be established, and Secondly, to prove further that one or more of the parties engaging in the conspiracy has committed one or more of the overt acts alleged in count three to effect the object thereof. [371]

The success or failure of the conspiracy is immaterial, but before a defendant may be found guilty of the charge, it must appear beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendant was an active party thereto.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in the third count in the indictment was entered into between two or more of the defendants to violate the law of the United States in the manner described in that count. It is necessary further that in addition to the showing of the unlawful conspiracy or agreement, the Government proved to your satisfaction,

beyond a reasonable doubt, that one or more of the overt acts described in the third count in the indictment was done by one or more of the defendants or at their direction or with their aid.

Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that either or any of the defendants named may have engaged in the performance of any of the acts [372] charged in the indictment as overt acts, could not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person understanding the unlawful character

of a transaction, encourages, advises, or in any manner, with a purpose to forward the unlawful enterprise, or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from the facts proved.

Where the existence of a criminal conspiracy has been shown, [373] every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other

essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men and women that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants or any of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties [374] to the conspiracy as charged, then you should make the deduction and find accordingly.

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object, you would be justified in the conclusion that such persons were engaged in a conspiracy. Nor is it necessary to prove that the conspiracy originated with all of the defendants, or that they all met during

the process of its concoction; for every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties before or afterward, in furtherance of the common design. Although, as I have stated, a common design is the essence of the charge, such design may be made to appear when the defendants steadily pursue the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.

If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty [375] the existence of a preconceived plan and purpose, that is sufficient to permit you to infer that the illegal agreement charged was in fact entered into.

The time and place of the formation of the conspiracy are immaterial, provided any of the overt acts were committed within the jurisdiction of this Court, on or about the respective dates alleged. The Government may have no knowledge of the exact time or place of the formation of the conspiracy, and to require it to specify the particular time and place, would defeat almost every prosecution under this act. For these reasons the time and place of the formation of the conspiracy are sufficiently fixed by the overt acts set forth in the indictment.

If any of the parties herein entered into a conspiracy, or aided or abetted the commission of the

crimes as set forth in the indictment, within a period of three years from the filing of the said indictment on February 23, 1949, then the time element has been fully satisfied under the statute.

An overt act need not be criminal in nature, if considered separately and apart from the conspiracy; it may be as innocent as the act of a man walking across the street or driving an automobile, or using a telephone. But, if, during the existence of the conspiracy, the overt act is done by one of the conspirators to effect the object of the conspiracy, the crime is complete, and it is complete as to every party found by you to [376] be a member of the conspiracy, no matter which one of the parties did the overt act.

It is not necessary that all the overt acts charged be proved, but it is necessary that at least one of these be proved, and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable.

To render a person criminally liable as a conspirator it is not necessary that he received any pecuniary advantage or benefit from the conspiracy or that he joined the conspiracy with the view of obtaining a pecuniary advantage or benefit. But before a defendant can be found guilty of conspiracy, there must be proof beyond a reasonable doubt that he knowingly and intentionally became a party to the unlawful undertaking.

Now I think, ladies and gentlemen, I have given you as briefly as is possible for me to do so the various rules and principles that should govern and guide you in the determination of the factual questions which are yours for decision. If you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If after consulting with one another you should be convinced that your view of the case is erroneous, please do not be stubborn and do not hesitate to abandon your own view under such circumstances. On the other hand, it is entirely proper [377] and indeed your duty to adhere to your own view if after a full exchange of ideas you still believe you are right.

If it should become necessary for you to communicate with the Court while you are deliberating in the jury room upon any subject matter connected with the trial of the case, you should not indicate to the Court in any manner how you stand numerically on the question of the guilt or innocence of either of the defendants, and this caution you should observe at all times until you have finally arrived at a verdict.

It will take all twelve of you to agree before you have a verdict. When all of you have agreed upon a verdict it is the verdict of the jury.

Upon retiring to the jury room you will, of course, select one of your number to act as your foreman or forelady, and it will be the duty of the one so selected to act as your spokesman in any further proceedings in this court.

If after you have retired to deliberate and while you are deliberating you wish to see any or all of the exhibits in the case, you may send word to the court.

The form of verdict prepared by the clerk for you has no significance in and of itself. It is prepared merely for the purpose of saving you the time and trouble of preparing it when you reach a verdict. I will read the verdict to you. After the title of court and cause:

“We the jury find as to the defendants at the bar as [378] follows:

“Raymond A. Leeper, blank on the first count, blank on the second count, blank on the third count.

“James Marvin Ballard, blank on the first count, blank on the second count, blank on the third count.”—

the same as to each one of the defendants. Of course you will write in the words “guilty” or “not guilty,” whichever expresses your verdict.

You are expected to find a verdict as to each defendant as to each count if you can conscientiously do so.

Has the Government any exceptions?

Mr. Karesh: None, your Honor.

The Court: Have the defendants any exceptions?

Mr. Deasy: None, your Honor.

Mr. Dunning: None, your Honor.

Mr. Kearns: None, your Honor.

Mr. Ehrlich: None, your Honor.

The Court: The jury will retire for their deliberations.

(Thereupon at 2:15 p.m. the jury retired in the custody of the marshal to deliberate upon their verdict, and at 3:35 p.m. the jury returned to the courtroom, and the following proceedings were had:)

The Court: The record will show the jurors—

I have two messages that have been sent to me by the jury. The first reads: “May we have the interpretation as to whether [379] aiding, assisting or abetting constitutes violation of the first count and violation of the second count?”

I suppose that means whether aiding and abetting would constitute a violation of the first and second counts.

Under our law the distinction between the principals and accessories have been done away with, and anyone who aids and abets in the commission of an offense is to be tried and punished the same as a principal. One does not have to necessarily perform a particular act to be guilty of the offense, and he does not necessarily have to do the act which is an offense. As long as he intentionally and knowingly aids and abets in the commission of the offense he is to be charged and punished the same as a principal.

Does that answer your question sufficiently?

Juror No. 6: Yes.

The Court: The other question: “Can we have a transcript of all the testimony?”

I don't know what answer to make upon that. I assume that counsel have had a daily transcript of it. It is not in evidence as a transcript unless there is a stipulation that the transcript may be available to either side and may be handed to the jury.

Juror No. 10: Your Honor, it is more or less the opinion, I believe, of the jury that we won't need it, because you have clarified some information we wanted in your first statement. [380] I don't believe we will need it now.

The Court: If you do, send further word to me. Is there any exception to be noted by the Government?

The Government: No.

The Court: By the defendants?

Mr. Deasy: None, your Honor.

Mr. Kearns: No.

Mr. Dunning: No.

Mr. Ehrlich: No.

The Court: Now you may retire.

(The jury at 3:40 p.m. again retired to deliberate upon their verdict.)

CERTIFICATE OF REPORTER

We, Clarence F. Wight and Joseph J. Sweeney, Official Reporters, certify that the foregoing 381 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WIGHT.

/s/ JOSEPH J. SWEENEY.

[Endorsed]: Filed June 21, 1949. [381]

Monday, June 13, 1949

(The jury returned into court, after deliberating upon their verdict.)

The Court: The record will show that the jurors are all present. Has the jury agreed upon a verdict?

Juror Gus A. Childress (Foreman): We have, your Honor.

The Court: Have you agreed upon a verdict as to each defendant as to each count?

Juror Childress: We have, your Honor.

The Court: If I may see it.

(The verdict was handed to the Court.)

The Court: The Clerk will read the verdict.

The Clerk: Ladies and Gentlemen of the Jury, harken to your verdict: "We, the jury, find as to the defendants at the bar as follows: Raymond A. Leeper, guilty on the first count, guilty on the second count, guilty on the third count; James Marvin Ballard, guilty on the first count, guilty on the sec-

ond count, guilty on the third count; Andrew Ingoglia, guilty on the first count, guilty on the second county, guilty on the third count; Patrick John McDonough, guilty on the first count, guilty on the second count, guilty on the third count; John Stoppelli, guilty on the first count, guilty on the second count, guilty on the third count. G. A. Childress, Foreman."

So say you all, Ladies and Gentlemen? [382]

Jurors: Yes.

The Court: Do you desire to have the jury polled?

Mr. Deasy: No.

Mr. Kernes: No.

Mr. Dunning: No.

Mr. Ehrlich: No.

The Court: The Clerk will record the verdict. Judgment will be entered in accordance with the verdict. Ladies and Gentlemen, you are now excused until further notice.

(The jurors retired from the courtroom.)

Mr. Ehrlich: Your Honor, on behalf of the defendant Stoppelli, I ask that your Honor permit the defendant to remain on bail pending a motion for a new trial, and if that is denied, pending his appeal.

I believe that the defendant Stoppelli has a good ground, good and valid ground for appeal in this matter.

There is no sense in my going over all of the law

in the situation. I am convinced personally that he has something that justifies his going to the circuit court of appeals.

The defendant Stoppelli in that connection, your Honor, came here voluntarily from New York and deposited his bail after he got here, which indicates that the man is not going to avoid the jurisdiction of this court.

The Court: Of course, the situation is somewhat altered now. Each of the defendants is remanded to the custody of the [383] Marshal. Your motion I do not care to consider today.

Mr. Ehrlich: Yes, your Honor.

The Court: I want to have from the United States Attorney his advice. I know nothing about this particular defendant other than what has been shown in the trial of the case. I propose to refer the matter to the probation officer for pre-sentence investigation. That is done, I now order the matter referred to the Probation Officer for pre-sentence investigation. The report is to be returned on the twenty-seventh of this month. In the meantime, I am not disposed to admit either or any of the defendants to bail unless—I will change that order; I cannot be here on the twenty-seventh; make it the twenty-third. The twenty-seventh starts the conference of the Ninth Circuit in Los Angeles. We will all be in Los Angeles at that time, and I am obliged to be in Reno on the twenty-fourth of June. So the order as to the probation officer is that he makes his report on the twenty-third day of June at 10:00 o'clock A.M.

Now, in reference to the matter of bail, I am not prepared to pass on that today as to this one defendant.

Mr. Karesh: The customary rule, your Honor, pending judgment is that the defendants be remanded.

The Court: I appreciate that.

Mr. Ehrlich: Yes, I am familiar with that.

Mr. Karesh: And we would oppose release on bail. Particularly—if your Honor would ask us, we would tell you the [384] defendant's record, if we may now, the defendant Stoppelli?

The Court: Do you have that record?

Mr. Karesh: Yes. He is five times a convicted felon. Ingoglia is three times a convicted felon.

The Court: Well, then, your motion is denied.

Mr. Ehrlich: What day for argument on the motion for a new trial, your Honor?

The Court: The twenty-third.

Mr. Dunning: On behalf of the defendant Andrew Ingoglia, your Honor, I likewise desire to make a similar motion as Mr. Ehrlich has made, and request for the purpose of the record that the defendant Ingoglia remain on bail pending hearing of the motion for new trial.

I don't suppose your Honor desires to hear argument on that now, but for the purpose of the record I make a motion for a new trial on behalf of the defendant Ingoglia, and request that I be permitted to file a written motion within the five days allowed by law.

The Court: Very well. Your motion that he be admitted to bail is denied.

Mr. Deasy: On behalf of the defendant Ballard and the defendant Leeper, I make the same motions previously made by Mr. Dunning and Mr. Ehrlich.

I may say that the record in this case indicates that this was the first arrest of the defendant Ballard. His bail is in [385] a substantial amount, \$5,000. I would ask that he be permitted to remain on bail.

The Court: That matter can be passed on much more satisfactorily if I have a report from the Probation Officer. I am going to deny it as to each one of the defendants.

Mr. Kernes: On behalf of the defendant McDonough I make the same motion, for the record, your Honor.

The Court: The motions are denied. The matters are continued to the twenty-third day of June at 10:00 o'clock.

Mr. Ehrlich: Your Honor, may I talk to you a moment?

The Court: Yes.

Mr. Ehrlich: It occurs to me that the rules are that the motion for a new trial—my recollection is that it has to be heard within five days, or is it that it must be filed within five days?

The Court: It must be filed.

Mr. Ehrlich: It must be filed. [386]

Tuesday, July 5, 1949

The Clerk: United States vs. Leeper, Ballard, Ingoglia, McDonough and Stoppelli.

Mr. Ehrlich: Your Honor, may the defendants be seated while we argue this motion?

The Court: Yes, the defendants may be seated.

Mr. Ehrlich: And may I address myself to the Court on behalf of the defendant Stoppelli?

The Court: Yes.

Mr Ehrlich: First, your Honor, without going over all of the evidence in this matter—it must be as fresh in your Honor’s mind as it is in my mind—we desire to point out from *Terry vs. United States*, reported in 7 Federal (2d) 28——

The Court: 7 Federal (2d)?

Mr. Ehrlich: 7 Federal (2d) 28, and *Ford vs. United States*, 273 United States 593, both to the same point, that the scope of a conspiracy must be gathered from the testimony and not from the terms of the indictment.

That is a general rule laid down by the United States courts, and its intention, as I understand it, is that because two or more people have been indicted and charged with a conspiracy that that in and of itself lends nothing to the case as against the individuals charged. In other words, the conspiracy, if existing at all, must be gathered from the [387] evidence adduced in the courtroom, and is not to be circumscribed by the indictment itself.

So that in the case of Stoppelli it is necessary to look to the things that he, Stoppelli, did, insofar

as his becoming or being a part of this so-called conspiracy.

In the Terry case, which is followed by all Federal courts and by the United States Supreme Court, they lay down another general statement which is old in the law of conspiracy: A conspiracy is not an omnibus charge under which you may prove anything and everything and convict for the sins of a lifetime.

Now, those two principles, your Honor, first round out the conspiracy.

Now, in our present case, briefly, where does Stoppelli stand?

The only evidence, the only word of evidence is the fact that on one of the eleven envelopes there was the tip of the ninth finger. There is no evidence of cooperation; there is no evidence of profit; there is no evidence of knowledge; there is no evidence of doing; there is no evidence of abetting; there is no evidence of proximity. There is nothing. And it is just as reasonable to presume, your Honor, and the law is that the evidence being circumstantial solely and wholly, that it must be inconsistent with any rational hypothesis of his innocence before the jury can find him guilty.

I should like to read briefly from *Bullock vs. Commonwealth*, [388] reported in 94 ALR, 407:

“It has been often enunciated by this court that a conviction may be had on circumstantial evidence alone, although it is sometimes looked upon with suspicion, where all the links in the chain of cir-

cumstances are sufficient to justify conviction. But circumstantial evidence, to justify a conviction, must point unerringly to the accused's guilt, and it must do more than create a suspicion of guilt. To be sufficient to sustain a conviction it must exclude every reasonable hypothesis of innocence. If the circumstances tending to show his guilt are as consistent with the defendant's innocence as with his guilt, they are insufficient."

The Court: But, nevertheless, it is a problem for the jury.

Mr. Ehrlich: But I want to go further. I will reach that in a moment, if I may, your Honor.

"If the circumstances tending to show his guilt are as consistent with the defendant's innocence as with his guilt, they are insufficient."

Now, bringing into my discussion for the moment as to this being a matter for the jury: Basically, your Honor, that is the law, not only of this state, but of every other state in the United States, with the possible exception of Louisiana; but the jury cannot be arbitrary in its ruling, the jury cannot say [389] that because there is something here therefore we will resolve this as against the defendant. The law is that they must resolve it, your Honor, in favor of the defendant and against the prosecution where there is only the type of evidence such as we have in this case. A jury, your Honor, may not determine that merely because a man is charged with conspiracy and merely because

there is one disconnected act, that therefore, and because he was charged with a conspiracy he is a part of the conspiracy.

The Court: Let us analyze that—I follow your argument, but let us analyze that: There is the inference of identity from the fingerprint; there is testimony that the fingerprint was placed upon the envelope within a period of thirty days prior to the first of November, was it not?—That the silver nitrate was placed on it by the officer, and there is the testimony of the expert to the effect there was a powdery substance in the envelope, as shown by the different shadows of the print.

Now, true, the defendant is not required to take the stand to testify in his own behalf, and no inference can be drawn of guilt from his failure to take the stand to testify; but the act says that possession establishes a *prima facie* case, one section states, and the other states if possession is shown, then the duty is on the defendant to explain the possession. [390]

Now, isn't there sufficient inference from the evidence that this envelope was as shown by the testimony of the expert to have been in the hands of the expert within thirty days prior to the capture of the other defendants, and the taking into his possession of this evidence, plus the fact that there was a powdery substance in it at the time the print was put on it, isn't that sufficient to draw the inference clearly that this defendant had possession during that thirty day period of this envelope,

and put upon him the burden of explaining the possession, which he did not do?

Mr. Ehrlich: May I answer that, your Honor: One, let's take the point your Honor made that the print was put on there within thirty days prior to the time of arrest. There is no evidence here that that print—and for the sake of this discussion I must admit that it is a good and valid print; we are not going to argue the value of the evidence—is there any evidence here that within that thirty day period there was heroin in that envelope?

The Court: There was a substance, and it was a powdery substance.

Mr. Ehrlich: Yes.

The Court: And in the envelope taken by the officers there was a powdery substance consisting of heroin.

Mr. Ehrlich: Yes. Is there any evidence, your Honor, that this defendant was with these people, knew these people, [391] did anything with these people, had any profit from this deal?

Assuming, for the sake of answering your Honor's question in this argument, assuming that he did sell the heroin to the other defendants: Let's assume that—and I have some cases which will answer some of your Honor's questions; but an inference, your Honor, may be drawn from a proved fact, and as we move from one proved fact to another, we follow in California and in this jurisdiction the so-called legal chain theory of circumstantial evi-

dence. In other words, that before a conviction can be had each link in the chain connecting the defendant with the commission of the crime must be proven to a moral certainty and beyond a reasonable doubt. That is, you can't leave out one or two spots.

Let us reverse the matter, your Honor: Let us say that Stoppelli sold to the defendants or gave to the defendants the heroin in question. Now, let us assume that he had it in his hands, put the mark on there thirty days before, had possession of the narcotics and he sold them. Does that make him a co-conspirator with these defendants?

The point, the entire argument is predicated upon the proposition as to whether Stoppelli was or was not a co-conspirator. And in answering further in detail your Honor's question, I should like to read several more cases to you.

In *Kassin vs. United States*, 87 Federal (2d) 183—

The Court: 87 what? [392]

Mr. Ehrlich: 87 Federal (2d) 187—would your Honor forgive me, please, I didn't intend that. In the *City of Indianapolis vs. Wheeler*—that is the case I want—132 Federal (2d) 879.

Now, in this case, your Honor, the defendant in the conspiracy case rented a room to one of the co-conspirators and permitted him to connect electric wiring to his own fuses, and so forth, and acting as an intermediary in the sale of certain land. In other words, there was a lot of cooperation, a lot going on between the defendant and the conspirators.

Quoting the court——

The Court: What was the essence of the conspiracy?

Mr. Ehrlich: In Indianapolis vs. Wheeler it involved—this case, I think, involved liquor. I can't read my notes clearly now, I wrote them so fast. I think this case involved liquor, as does the Falconi case, and the extent of the connection with the unlawful conspricay was limited to the renting of a room in Chicago and permitting the connection of electric wiring and acting as intermediary for the sale of certain lands. The Court held——

The Court: Not a thing there that was in any way illegal in and of itself.

Mr Ehrlich: But it was a fraud case where they used——

The Court: I mean, what he did there could have been done entirely innocently, but the possession of these narcotics [393] presents an entirely different thing.

Mr. Ehrlich: Well, if your Honor wants a narcotic case, I will give you one right direct, if I may, sir. In other words, your Honor thinks that in view of the fact that this is a narcotic case that perhaps the testimony can be weaker than that prescribed in the rule, or do I misunderstand the Court?

The Court: I simply state this to you: That where an act innocent in and of itself was done, unless it is connected up in the same way with some illegal operation, then you have a situation far dif-

ferent than in this case where the act your client did, the possession of the narcotics, was in and of itself a violation of the act.

Mr. Ehrlich: I shall read, if your Honor please, from 113 Federal (2d) 982, United States vs. Koch. The defendant was charged with a conspiracy to import and unlawfully dispose of narcotics. The evidence showed that one of the alleged conspirators, Celli, obtained 171 ounces of cocaine and 12 pounds of opium in Montreal, Canada; that he telephoned to Mauro in New York about it and took it to Boston with the connivance of one Bovell and delivered it to Mauro in Brooklyn.

The only evidence connecting appellant Koch was as follows: That appellant met Mauro on a street in New York, inquiring of him, Mauro, if he had cocaine to sell; upon being informed by Mauro that he had, Koch agreed to buy it for \$25.00 an ounce. It [394] was understood that the cocaine would be delivered to Mauro's house in Brooklyn to one Al Kobach.

This plan was carried out and a few days after that Mauro met the appellant and Kobach and appellant complained that the cocaine quote, "did not show good" close quote, and asked Mauro to take some of it back, which Mauro agreed to do, at a meeting some days later. Several days later they did meet and the appellant then paid Mauro the agreed price for seventy ounces, and at the same time returned seventy-five ounces, which were later sold by Mauro, one can being sold subsequently to a Government agent.

The question for determination was whether the evidence was sufficient to prove that the appellant had joined the conspiracy.

The Court said at page 983:

“Here, for aught that appears, the appellant had no knowledge whatever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro’s possession of it was unlawful, and that was true also of the sale to and purchase by him, but that was not enough to warrant a finding that he knew that Mauro was not, or had not previously been acting alone in getting possession of the drug. The purchase of the cocaine from Mauro was not enough to prove conspiracy in which Mauro and the appellant participated. They had no agreement to [395] advance any joint interests. The appellant bought at a set price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the appellant a conspirator with Mauro and those who were his co-conspirators.”

Citing *Dickersen vs. United States*.

“It was necessary to the Government’s case to show that the appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully.”

There is a case, your Honor, the Koch case. There was a great deal of maneuvering, a great deal of buying, a great deal of returning, a great deal of finding fault in merchandise in which all of these people participated, and the court said that that was not enough, it was necessary to the Government’s

case to show that the appellant was in some way knowingly associated in the unlawful common enterprise, citing *United States vs. Peoni and Muyres vs. United States*.

There is a case ten times stronger than the case that has been adduced against this defendant.

Now, I have another narcotic case—of course, your Honor is familiar with the general cases that where a man knowingly sells to others things to be used and he even knows that they are to be used in violation of the law, that he cannot be held as a co-conspirator unless it appears that he [396] was a part and parcel of that conspiracy. That is the *Falcone* case decided by the United States Supreme Court, to which I will refer in a few moments.

The *Falcone* case—that is 311 U. S. 205—

“The gist of the offense of the conspiracy is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. Those having no knowledge of the conspiracy are not conspirators, and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy, even though his sale may have furthered the object of the conspiracy to which the distiller was a party, but of which a supplier had no knowledge.”

That is a rather long case going into the general subject of conspiracy.

Now, in 319 U. S. 703, *Direct Sales Company vs. United States*, the plaintiff was a drug manufacturer and wholesaler and conducted a nationwide

mail order business. The evidence relates chiefly to the plaintiff's transactions with one Tait and dealings with others. Tait dispensed illegally large quantities of morphine, which he purchased from plaintiff. The indictment charges the plaintiff, Tait and three others, to and through whom Tait illegally distributed the drugs, with conspiracy to violate the narcotics act. They were all charged together, [397] the plaintiff, Tait, and three others.

The plaintiff supplied Dr. Tait with morphine for a long period, and Dr. Tait gradually increased the morphine to a point where he was receiving 5,000 to 6,000 one-half grain tablets per month. The average physician purchased no more than 200 to 400 half-grain tablets a year. This continued over a three or four year period.

First the Court referred to the *Falcone* decision. That decision comes down merely to this: That one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The scope of the concession must be measured in the light of the fact with reference to which it was made. This relates both to volume of sales and to casual and unexplained meetings of some of the respondents with others who were convicted as conspirators.

The Court found this evidence too vague and uncertain to support a finding the respondents knew of the distiller's conspiracy.

It then goes on down to re-recite the Falcone case and reciting the testimony that they were selling recklessly to a man and must have known that no doctor could use 5,000 to 6,000 one-half grains per month. That is 12,000 quarter grains [398] per month, when the average amount taken by the doctors generally is about 400 one-quarter grains a year, and here they were selling this man 12,000 one-quarter grains per month, and he was handling it with others, and then they said that that was not proof of conspiracy.

There is one case that is not a narcotic case, but it was, in fact, a great deal like the present case, where there were certain doctors, who, upon examining people's eyes would inform them that they needed a very special type of operation and would charge these people a great deal of money, when in truth and in fact they didn't need any such operation, and it was strictly an out and out bunco game, *Mazurosky vs. United States*, 100 Federal (2d) 958. The defendant was indicted for conspiracy to use the mails to defraud. The appealing defendant was a pawn broker who knew a party by the name of Nelson and a Dr. Brown. Nelson and Dr. Brown after examining patients would tell them at an eye operation was necessary, and then perform a fake operation, charging them an average price of \$500.00.

The Court held that evidence of the defendant's association with others who were engaged in the eye frauds and depositing checks for collection in

banks for them and using the mails for that purpose was insufficient to sustain a conviction of conspiracy and using the mails to defraud, in the absence of evidence that the accused had knowledge of the [399] fraudulent scheme at the time he cashed the checks.

The Court said: "However, in our opinion the evidence fails to support any such finding. The only evidence in the record suggesting guilty knowledge on the part of the defendant is that he knew that ten years before Nelson had been engaged in an eye fraud perpetrated upon Wagner; that defendant at that time cashed the check obtained by Nelson from Wagner; that defendant had to pay in excess of a thousand dollars to square that check; that the defendant during the years 1929 to 1935 had asked Nelson, 'How are the suckers, Slat?' 'Are you making any big sales?' And that in 1938 the defendant told Nelson that the checks were getting a little hot. It is not shown in the record whether this latter statement was made before or after the *belter* transaction, which was the subject of the fourth count of the indictment.

"That the defendant may have had guilty knowledge rests upon suspicion only, arising from his acquaintance or association with Nelson and others. That is not enough to convict.

"It is our opinion that there is no evidence in the record from which it can be found that the defendant had knowledge of the fraudulent schemes at the time he cashed the checks for those actively

engaged in the frauds. The most that can be said from the evidence is that the defendant cashed the checks under what may be said to have been suspicious circumstances.”

There are a great many other cases, your Honor. In *U. S. vs. Bruno*, 105 Federal (2d) 921, the facts were about as follows: Bruno and Iacono were indicted with 86 others. The evidence disclosed that the object of the conspiracy was to smuggle narcotics into New York and distribute the narcotics to addicts in New York, Texas, and Louisiana. This plan required cooperation with the smugglers, middle men who paid smugglers, and two retail groups, one in New York and one covering Louisiana and Texas. The Court found sufficient evidence to convict Bruno, but as to Iacono the Court said:

“Iacono was probably guilty also, but the evidence to establish his guilt was tenuous. All that was shown was that he had received in New York seven money orders from members of the Louisiana retailers, some of them taken out in assumed names. They were for about \$6,800 in the aggregate, but it did not appear that they covered the proceeds from the sales of narcotics. Even if these documents were enough to convict Iacono of complicity in some sort of illicit enterprise—itself a somewhat gratuitous assumption—the accused were shown to have been a disreputable lot and all sorts of ventures may have been afoot among them. The remittances would [401] have been more closely interwoven with the sale of narcotics. The case is close, but we think that not enough was shown.”

Now, there is a case. Here was a man who was doing the cashing of all the checks coming out of Louisiana and Texas, and the Court said, "Well, he may be guilty, we won't argue that, but they have got to do more, they have got to show that he is part and parcel of that conspiracy, they have got to show that he knew about the conspiracy, they have to show that he did something about the conspiracy and narcotics."

There is not one word that is inconsistent legally with the defendant's innocence. Suppose he had taken not only the one envelope, but suppose he had taken all of the eleven envelopes and had gone over and delivered them to the other defendants and had said to them, "Here, this will cost you \$500.00," and went on about his business. He certainly would not be a co-conspirator, even though he knew they were going to use it for illicit purposes.

And here you do not even place the defendant in the presence of any of the other defendants. You show no association, you show no profit, you show no course of conduct, you show nothing at all except one fingerprint on one envelope.

And suppose, your Honor, suppose he put his fingerprint on that one envelope: Is he too, then, to be burdened with the other eleven envelopes on which he had no fingerprint? [402] Where would that divide the amount and quantity of his crime? Suppose he sold just that one? Suppose he gave it to them?

Now, if we add to that the statement on page 251 of the transcript, the voluntary statement—no, it wasn't a voluntary statement, it was asked by Mr. Karesh speaking to Greene:

“Now, how did you come to that conclusion, that the print on the envelope is the print that belongs to John Stoppelli, the defendant?

“A. We have a national book, every district supervisor in the *company* in the Narcotic Bureau, of all of the major known——”

And then Mr. Karesh broke in.

That, your Honor, added entitles this man to a new trial. I don't know what went on in the jury room, but I venture to say that every juror that sat on that jury weighed that, and even though your Honor struck that from the record, you can't unring the bell. These people are just like we are; they hear it and they remember, and they must have said either to themselves or audibly to others, “Well, this fellow, he has got a bad record. You heard what Greene said, he compared that fingerprint with the fingerprints in the National Narcotics Book which is maintained and possessed by every Bureau.”—

And, so, your Honor, if there is to be any mistake made, [403] it ought to be made on behalf of the defendant, rather than against him. I have no community of interest with this type of business, but I have every interest and every community of thought and feeling with the law as it ought to be administered, and it is more important, your Honor,

that this man get a new trial on this weak evidence than it is that a thousand men——

The Court: As I understand your argument, it is pointed—excepting the statement that you just mentioned about the testimony which you claim Mr. Karesh elicited from the witness, as I understand your argument it is pointed to the third count, the conspiracy?

Mr. Ehrlich: That is the conspiracy count.

The Court: How about the other two?

Mr. Ehrlich: As to the—may I get my copy of the indictment? Now, the first count is the Harrison Act and the second count——

The Court: The first is the sale and the second is the concealment.

Mr. Ehrlich: Yes, and the third is the conspiracy. As to the sale, there is no evidence in the record of any aiding or abetting on the part of the defendant, Stoppelli, which would bring him within the classification of a principal. There isn't one word that he aided or abetted in the sale or the delivery of this merchandise.

The Court: It goes further than sale, dispense and [404] distribute.

Mr. Ehrlich: Possession.

The Court: Sale—dispensing and distribution are included in the first count.

Mr. Ehrlich: Yes. There is no evidence that he aided in the sale, there is no evidence that he dispensed, there is no evidence that he distributed.

The Court: Other than that it went from his hands to somebody else's hands.

Mr. Ehrlich: Your Honor, supposing I had it in my hand and it next appears in your Honor's possession, and that is all we know? Can we infer from the fact that I had it at one time and you now have it—and I say this with all respect—that your Honor stole it from me, can it be inferred from that that I gave it to you, or can it be inferred from that that I sold it to you?

The Court: It is the obligation of the defendant to make the explanation of possession.

Mr. Ehrlich: Well, your Honor, that is what the Code says; that is, if you put it in his possession. But suppose, and as I argued to the jury, suppose I picked it up that way (illustrating), and I put it down (illustrating), is that in my possession, or does possession presuppose, as the law says, if my understanding is correct or my memory serves me, possession must be in conjunction with something else? It can be [405] possession for the moment by holding it that way (illustrating), but possession in order to come within the law must be possession in connection with something else. It can't be—you know the old alcohol and liquor cases where they tried to make two charges out of possession and transportation, and the Supreme Court of the United States many times went down the line and said, "Possession in order to be possession must be connected with something." And is there anything in this evidence that would show or from which it can be inferred that Stoppelli had this in his sole personal possession? There isn't a word in

the evidence. Is there any evidence here to show——

The Court: If you have something in your hand, haven't you got it in your possession?

Mr. Ehrlich: Possession, your Honor, for what? What does the law want us to do? The law says I am not to have in my possession untaxed narcotics, out of the seal, label, and so forth, and without prescription. There is no evidence here that in this envelope at the time that that print was put on there was, (1) heroin, or if it was heroin, was it improper or was it out of the original stamped package?

The Court: There is an inference from the circumstances——

Mr. Ehrlich: Very, very slight. In order to draw an inference, you have to approach it——

The Court: Isn't this the rational inference to draw: That if at the time the defendant had it in his possession there [406] was a powdery substance in it, and when captured by the officers it had a powdery substance, which consisted of heroin, isn't it rational to draw the inference that at the time the defendant had it in his possession it had heroin in it?

Mr. Ehrlich: That might be reasonably logical, your Honor, but the law breaks in and says we cannot come to a conclusion by possession only——

The Court: But, wait a minute, the law says if you have possession that it is sufficient, unless you can explain that possession. That is the statutory——

Mr. Ehrlich: Well, I will submit to your Honor, if I may have just a little time, I will submit some authorities on that which I think will bear out my position.

The Court: Well, I will interrupt at this time to take up another matter.

(Thereupon the Court took up another matter.)

(Recess.)

(The Court took up some other matters.)

The Court: Now you may proceed.

Mr. Ehrlich: Your Honor, I thought during the recess I would get a few cases on the point of the substantive offense resulting from conspiracy, but I should like to have your Honor's permission to have a day or two within which to put those together and let my motion stand for a couple of days until I can get those authorities for you. [407]

I merely wanted to add at this moment when your Honor indicated that you were thinking along the line that the heroin was in the package, we already know a certain percentage of it was not heroin at all, it was some kind of sugar—I think it was called sugar milk, or something like that, as I recall it now, so it wasn't all heroin, so that the inference must be limited at least to the extent of excluding the sugar milk, and I should like, your Honor, if I May, several days in which to get those cases for you on that point.

The Court: I will hear from the other counsel for the defendants.

(Mr. Dunning and Mr. Kernes and Mr. Deasy thereupon made arguments in support of motions for new trial on behalf of their respective defendants, which motions for new trial were denied by the Court, and judgment and sentence as to the defendants Leeper, Ballard, Ingoglia, and McDonough was pronounced by the Court.)

The Court: As to the defendant Stoppelli, that matter will be continued, granting leave to counsel for the defendant Stoppelli to furnish the memorandum of authorities which he asked leave to furnish. Can you furnish those within five days?

Mr. Ehrlich: Yes, your Honor.

The Court: And counsel for the Government may have five days within which to reply thereto, and the matter will then [408] stand submitted.

Mr. Ehrlich: I understand, your Honor, that memorandum is only to go to the substantive offense, you don't want the rest of the citations?

The Court: No, you have given your citations.

Mr. Ehrlich: Yes.

The Court: Counsel for the Government may wish to reply to those cases.

Mr. Karesh: I haven't got them.

Mr. Ehrlich: Well, I will file a short memorandum covering all of them.

Mr. Karesh: When will judgment be?

The Court: We will continue it to the 15th.

Mr. Ehrlich: I will get it in in sufficient time.

Monday, August 8, 1949

Mr. Karesh: I would like to be heard briefly. I did not file a written motion. I believe Mr. Ehrlich has some affidavits to file.

Mr. Ehrlich: May I take up the matter of the affidavit Your Honor, not by way of illustrating the length of time I have been in practice, but only to make a point, I have tried a great many conspiracy cases over the years and I have tried a great many other cases. This case, as the saying goes, has absolutely got me down. Following the conviction and the sentence I went to the County Jail. I discussed this matter at great length with the other defendants, who for the first time felt free to talk to me about it, and Ingoglia, who had the narcotics, told me and told everybody else there certain things: (1) that neither he nor anyone else at any time knew this man Stoppelli, had ever talked to him, had ever seen him——

The Court: That was all brought out at the trial, wasn't it?

Mr. Ehrlich: Yes, but this is Ingoglia and the defendants that took the stand had never seen him. Ingoglia also told the other defendants——

The Court: I wouldn't put too much credence in his statements. [410]

Mr. Ehrlich: ——that he bought these envelopes on which the one print was found in San Francisco; that the narcotics came here through a relative of his, and that he, together with one of his relatives, or several of his relatives, cut the nar-

cotics with this sugar that they use and packaged them in those envelopes which were purchased in a store on Market Street which I believe to be, from what he said, J. C. Penney's.

Now, Your Honor, if I thought for a minute that this man sitting here was part and parcel of this conspiracy you wouldn't hear me stand and argue to this Court to give this man a new trial. If I thought for one moment I had been misled in this matter I wouldn't be standing here on the second or third occasion appealing to Your Honor to consider this matter and grant this man a new trial.

I have talked to Mr. Dunning, one of the other attorneys, if you will recall, who wanted to come to see you and to relate what he had been told, what had been told to him by Ingoglia prior to the time of the trial, which is in line with what he has told me since that time and which bears out the defendant Stoppelli's story to me at the beginning, that he had nothing to do with this, that he had never seen these people, that this was not his print, couldn't have been, and all of that is borne out by the first time I appeared in this matter before Your Honor, when we went [411] —after we went to the Commissioners' office, none of these people knew this man. No one of the defendants told them he knew the defendant or talked to him.

I have never felt so burdened by a case as this one. I feel something is wrong in this case. I don't know what it is, I am frank to say. I don't accuse anyone of anything. I have got it so clearly

in my mind, the channels through which this thing developed. I have certain signposts to indicate to me that this is not the type of conspiracy we have run into over the years. There is something wrong about that print, Your Honor. What it is, I don't know. I haven't the print. But I believe in all fairness if there were going to be a mistake made I think, Your Honor, it should be made in favor of the defendant.

This man has a record for this, for narcotics. He had just gotten out of the penitentiary. He was in New York. He was charged in another indictment, which is on file here, with being in San Francisco on a particular day, and until I told Mr. Karesh he couldn't have been here because on the very day and very time he was supposed to be in San Francisco he was reporting in the office of the Probation Officer or Parole Officer in the city of New York. All of these things go to add up to something I don't understand. I feel a great moral obligation to this defendant because I believe him. I believed him when he told me the first time, "This is nothing new to me. If I did this I would tell you I did it. I didn't do it."

I have no way of directing an investigation be made of this matter. I don't know whether Your Honor has that power. But it seems to me, regardless of what Your Honor may rule (and I say that respectfully) I am going to ask the Attorney General's Office to go into this matter.

I have made mistakes, Your Honor, when I was guided by what I have up here; I have never made

a mistake when I feel down here that something is wrong. I feel sincerely that this man is not in on this thing, that he has never been in this thing, and I think he is entitled to an opportunity to show it. I didn't put him on the stand because I didn't feel that he could deny anything other than saying, "No, that isn't my print." He would have had to admit his record. I had hoped that this jury would consider what a conspiracy is and how it is to be proved, and what are the essentials, but the thing didn't work out.

I am satisfied that had he been tried on the original indictment filed by the Government charging him with being in San Francisco and committing this crime, had he stood trial on that allegation I am satisfied they would never have convicted him in a million years. It was only the fanfare of a conspiracy trial which puts this man in this position.

It may be said, of course, that "as ye sow so shall ye reap." I have no quarrel with sending a man to the penitentiary who has committed a crime. I have no defense of Stoppelli for the times he has been in the penitentiary, but I have every quarrel—rather, I have every concern for him at a time when I feel in my heart and my soul, when I feel that this man is not guilty of this crime.

I feel that Mr. Green, who testified, guessed a great deal, Your Honor. I feel that that man—and I have shown that photograph to people who are supposed to know something about it, who have questioned that print. Bear in mind, if you will, all

the other prints that are on there: Ingoglia's print, other prints, a woman's print. None of the persons that makes this stuff, nobody has found a thing except that tip there of this man. How could he— If he handled eleven packages, Your Honor, how could there be only that one little point of one? How could it be that if Mr. Green was showed by myself an inability to hold that package that way, he said, "Well, he held it this way. The weight was on the thumb," holding the weight of that package in order to make it fit. I don't accuse him of committing perjury. I say he made a mistake. I say he is not the capable expert that we were led to believe.

Certainly, if Stoppelli had been here, if there was some scintilla of evidence that he was in association [414] with these people, if there was some scintilla of evidence that he had aided these people or abetted them, or that they talked to him in New York, or that there was some correspondence, or just something we might infer from that, "well, he knew them; he has a record for this; this is his business, so to speak; we can infer that he was part of this group." But there is no such thing, Your Honor, indicating the man did.

Your Honor indicated a minute ago you didn't believe Ingoglia. I don't believe him, either, because he knew these facts before the trial and he should have testified to them, and I told him so, and Mr. Dunning and myself went down to see him and asked him if he wouldn't come up and testify and

give the names of the people that helped him cut that, and give us the name of the persons for whom he purchased, and give us the name of the person who delivered it, and while admitting that this man had nothing to do with it he refused to do anything about it.

Now, Mr. Dunning told me the names of the people involved. I haven't his permission to divulge them to Your Honor, although he did say that if Your Honor should desire it he would be pleased to tell you personally what he knew of the matter.

Now, I don't know what else to say to Your Honor except to tell you that I have already told you what I feel and what I believe and what I know. I have already argued [415] the law to you. I have three affidavits which I should like to make part of the record, my affidavit and those of those two boys; and I hope Your Honor believes these affidavits, they didn't tell the truth when they took the stand. I could see that. But I presume that they were advised to do what they did do and conduct themselves as they did. They are two boys.

I think—I believe Your Honor ought to give this man a new trial. Maybe we are making a mistake. Maybe we are not doing the right thing. Maybe it is not well that he have a new trial. But in any event—in any event, we will have done something here which is in line with the circumstances and the evidence, and if there is a mistake it should be in favor of this man, because Your

Honor knows that with his record even if you wanted to help him the record wouldn't very well permit you to do it. It is too big. The presumption is too great. The length of time is too long to say, "Well, I may make a mistake but this is it.

I have nothing I could add.

The Court: These affidavits you refer to, are they to the effect that these other defendants had no communication in any manner or form with Stoppelli?

Mr. Ehrlich: They are to that effect and to the effect that in a general conversation where they urged Ingoglia to tell the truth that he admitted all these things and refused [416] to do anything about it. They go further than what those boys testified to. Your Honor, I have my own affidavit of my conversation with him, what he said to me, which is in line with what these boys have in their affidavits. I can produce Mr. Dunning who, if Your Honor would talk to him, permit him to talk to you, would tell you many details.

The Court: He is simply going to relate what Ingoglia told him?

Mr. Ehrlich: He will relate also who retained him to defend Ingoglia and the connection between the person who retained him and Ingoglia. Your Honor, there is something wrong with this case and I don't know where it is, but I am going to stay with it as long as the good Lord lets me. I have Your Honor's permission to file these affidavits?

The Court: Yes, you may file them.

Mr. Karesh: May it please Your Honor, since counsel has gone outside the record I might make this observation with respect to the evidence in this case: One of the jurors came to see me about what happened afterwards—of course this was confidential—and he said that that jury took just one ballot to find Stoppelli guilty. I would like to say about Mr. Stoppelli, Mr. Stoppelli's counsel indicates he wouldn't do this thing. I think he did do it because he has gotten off very light in the past. A fifth time. He is a fifth time—a five time felon. The fifth [417] time the judge gives him three years, which he considers extremely fortunate, so Stoppelli says, "I can afford to stay in this racket."

I was reading a case, 164 Federal 2nd, United States of America vs. Perillo, and I notice for some reason that I can't understand, here is Mr. Stoppelli indicted and not tried. This is the same Stoppelli. This Stoppelli has been getting away with lots, but this time he slipped. If you are going to believe Ingoglia you have to believe Mr Green. And if a narcotics agent ever deliberately framed Mr. Stoppelli, if we wanted to frame Mr. Stoppelli we could have put a bigger frame on him. The expert was positive that is Stoppelli's print on that envelope.

I notice both Stoppelli and Ingoglia told the Probation Officer, "If I were guilty I would have plead guilty." I am too wise for that. Both said that: "I am going to plead guilty if I were guilty."

The statute says if you've got narcotics in your possession—and he had them in his possession if you believe the expert—and you must because it isn't contradicted—within thirty days. Mr. Stoppelli handled those narcotics in that envelope and his print is on that envelope, and you can't forge it without someone knowing. He asked them to examine the print to see if they could find prints. It is very difficult to determine to whom a single fingerprint belongs. It isn't like a whole [418] set. A single print you have to look at and go over laboriously, and that is what happened in this case, and when he found Stoppelli in his black book—and of course his name is there—and naturally the agent who knew the print finally came and he had the print of Mr. Stoppelli and treated it with silver nitrate solution they both matched the print of Mr. John Stoppelli.

I don't believe Ingoglia when he says he picked this stuff up in San Francisco and bought the envelopes in San Francisco. He has been sentenced to six years. He knows he isn't going to get parole. He hasn't anything to lose by filing this affidavit. He is going to show Mr. John Stoppelli.

The law is clear in the matter of narcotics. The Direct Sales Company versus the United States, 319 US 671, distinguishes that with the Falcone case cited by Mr. Ehrlich in his brief—

The Court: I am familiar with the Direct Sales Company case.

Mr. Karesh: It lays down the law, may it please the Court, that there is a distinction between those products which are inherently and in themselves contraband as distinguished, Your Honor please, from the *Falcone* case, where they say these exhibits and sugar could have been used for legitimate purposes. And may it please the Court, the

Supreme Court has said when you handle a large amount of narcotics you know they are going to be sold and re-sold and you are part of a conspiracy, part and parcel of a conspiracy. I think our case is much stronger than the case of *United States vs. Direct Sales Company* because there we have a legitimate manufacturer selling to a physician who had a right to buy and that had a right to re-sell, and the conspiracy arose out of the fact that they said, "You know it is going to be peddled illegitimately." I think *United States versus Bruno* laid down the same rule.

When you pick up the check in a narcotics case you are stuck. You've got the direct distinction between that which is inherently evil and inherently proscribed and that which is not. Heroin is proscribed, a proscribed drug, cannot be sold except that certain physicians who had large quantities on hand may get rid of it. But heroin is not sold.

This man is part and parcel of the conspiracy. The indictment does not say these men and these men alone conspired to violate the conspiracy statute. If we had alleged that we would have been in a very bad position, if we had said, limited the place of the conspiracy to Oakland. We say "other

places unknown and other people unknown.” In the case of—I forget the name at the moment—there was a reversal because it was limited to a certain place and the [420] government attempted to prove evidence of what happened on the other side.

I say Mr. Stoppelli handled twelve ounces of heroin and let it go out of his possession, and therefor he knew that that narcotics was going to be sold, and he was part and parcel of the conspiracy. You don’t have to know the members of a conspiracy to be part and parcel of it. The moment you turned those narcotics over to another person who then in turn—they were turned over to someone and got to Ingoglia—he is part and parcel of that conspiracy. I think that is the holding in the Direct Sales case, which I have cited. They had fingerprint experts there and the court said, “It is his fingerprint. Other evidence.”

We don’t have to pass on the proposition of whether or not a conviction could be sustained on the basis of a fingerprint alone. Of course there is evidence here the narcotics came from New York, the defendant came from New York, the narcotics were handled within thirty days. You have to consider the price, \$900.00, which is the wholesale price for the sale.

I ask Your Honor to sustain the conviction on all counts. There is nothing new before Your Honor that Your Honor did not have at the time the motion for judgment of acquittal was made on

behalf of the defendant Stoppelli. Your Honor has ruled on that, and I think correctly, and I again ask Your Honor to rule. As far as this defendant being framed, he hasn't been framed. He handled those narcotics and the evidence is clear and convincing or Mr. Ehrlich would have brought in his own fingerprint man.

We ask Your Honor to sustain the verdict on all counts.

The Court: Upon this conspiracy charge it appears to me that the strongest case that can be found in support of the Government's case in this Direct Sales Company which Mr. Karesh referred to. The Supreme Court in that case distinguishes the *Falcone* case by the nature of the commodity dealt in. In the *Falcone* case the conspiracy was to sell sugar and other commodities which were not restricted or incapable of further legal use except by compliance with rigid regulations such as apply to narcotics. The Court in the Direct Sales Company case brings that out very clearly, and referring to the *Falcone* case says:

"The commodities sold there were articles of free commerce, sugar, cans, etc. They were not restricted as to sale by order, form, registration or other requirements. When they left the seller's stock and passed to the purchasers hands, they were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulphate. [422] The difference is like that between toy

pistols or hunting rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inerently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

“This difference is important for two reasons. One is for making certain that the seller knows the buyer intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it.”

Now the Court in that cases uses this language, or language to this effect:

“Sale of restricted goods in unlimited quantities, stimulated by high pressure methods, working in prolonged cooperation with a physician’s unlawful purpose, is sufficient to show unlawful cooperation in unlawful plan and intent is therefore implied.”

That is at Page 1270. [423]

In the *instance* case we have no evidence of sale by this defendant to the other defendants, and from aught that appears the heroin might have been stolen from Stoppelli, taken from him without his consent. And possession of a small quantity may have been merely for the purpose of examination,

or for some other purpose that does not appear in the evidence. We do not know for what purpose he possessed it.

I think we must keep in mind the distinction that on a conspiracy charge there is no *prima facie* case to be inferred from the possession that there is a conspiracy. The inferences which the statute permit the jury to draw are not present in a conspiracy case. We have in this case no evidence of any relation or acquaintance or communication, written or verbal, between Stoppelli and any of the other defendants.

I am making these remarks as I feel that they pertain to the conspiracy count. I think the other two charges fall under a different category and merit different consideration. However, I do have very serious misgivings under the decisions, particularly under this Direct Sales Company case, that there is sufficient evidence to sustain a conviction of Stoppelli under the conspiracy count. Aside from the legal question, assuming the government's position on the conspiracy count is correct, I do feel that the [424] discretion with which the Court is clothed, and based on the motion for new trial, would be to favor Stoppelli as to the conspiracy count, because of the fact that the evidence is not sufficiently strong, and I feel that it is too vague and has too much uncertainty for me to permit the verdict thereon to stand.

The Court grants a new trial to the defendant upon the conspiracy count, the third count.

As to the other two counts, I feel they are in

an entirely different position. This defendant was entitled to a trial by jury. He received his trial by jury. There was substantial evidence in the case that he had possession of at least one of these envelopes. The evidence is sufficient to show he had possession within thirty days prior to the time the other defendants were apprehended and the narcotics recovered by the officers. There is evidence that I think is substantial that there was a substance in this envelope when it was in Mr. Stoppelli's possession.

I have had several letters from Mr. Stoppelli's relatives, including his wife, protesting his innocence. I have given the matter considerable consideration. It was a matter for this jury to determine. I am not in a position to say that this evidence is not sufficient to justify that jury coming to its conclusion. The evidence was sufficient [425] to justify the jury concluding this defendant had possession of these narcotics, or at least a part of them. In view of the fact that he did not see fit to take the stand and deny it, or make any explanation, I don't think I am in a position to say that he is not guilty. To say he is not guilty I am obliged to say his fingerprint was not on this envelope, a thing he did not deny at the trial of the case. I am obliged to say Mr. Green was utterly and entirely mistaken. He testified that out of millions of fingerprints there has only been one known case where two fingerprints were the same, and in that instance they were twins. It has become recognized as quite an exact science that if we find two finger-

prints the same, that the same individual made the two prints.

In view of the fact that the statute, or the statutes, are couched in the language they are, Congress in its wisdom has decided the statute should be strengthened for the purpose of making the laws more effective to stop this traffic and the apprehension and conviction of those engaged in it. When we go beyond the record, as both counsel have done, we find a man who has been heretofore convicted of criminal offenses, including narcotics; and that at the very time these transactions were on he was not in jail, he had gotten out of jail. If we are going to conjecture as to what he was doing in the meantime, it is [426] probable to surmise he went back to the activities he had theretofore been engaged in, in view of the fact, particularly, that we find his fingerprint upon this envelope.

The motion for new trial as to the first and second counts are, and each of them is, denied. Is the defendant ready for sentence?

Mr. Ehrlich: May I ask the Court at this time that 31866-H—— Have you any objection to dismissing it?

Mr. Karesh: No, I have no objection to dismissal of the original indictment.

The Court: Is that pending here before me?

Mr. Karesh: No, that was before His Honor, Judge Harris. I presume we might have to make that motion before him. I have no objection. This indictment superceded it and we presented the conspiracy.

Mr. Ehrlich: I think that was all transferred to Judge Lemmon's court at the time the matter first came up.

Mr. Karesh: I think so, your Honor. There is also 31754-H, the original indictment on another four defendants, that is still outstanding.

The Court: It is your motion, then, that the indictment in each of those cases you have referred to be dismissed?

Mr. Karesh: I would have to write the Attorney General [427] for permission. I am sure he will grant it. The Court on its own motion, or on the motion of the defendant, could grant it. But if I were to move for it I would have to write Washington.

The Court: Well, you better contact Washington.

Mr. Karesh: All right.

Mr. Ehrlich: We will just reserve that motion.

Mr. Karesh: I will write Washington.

The Court: Is the defendant ready for sentence, and if he is, has he any statement to make before sentence is pronounced? Is there any further information he cares to give?

The Defendant: Your Honor, I am innocent of this crime.

The Court: It is the judgment and sentence of the Court that the punishment upon the first count, the defendant be imprisoned for a period of five years; and judgment and sentence of the Court that the punishment upon the second count be imprison-

ment for a period of six years. It is the judgment of the Court that these two sentences just pronounced are to run concurrently, that is, one with the other.

Mr. Karesh: There is a mandatory fine on the second count, your Honor.

The Court: On the second count there will be a fine as against the defendant of \$100.00. [428]

Mr. Ehrlich: Your Honor, may we first have a stay of execution of the judgment for about a week? My reason for asking that is that I am going to ask the Court to fix bail on appeal in this matter.

The Court: You may have a stay.

Mr. Ehrlich: Would your Honor fix bail on appeal?

Mr. Karesh: We will oppose it, your Honor. Excuse me.

Mr. Ehrlich: I want to say that this defendant, one, came here voluntarily; two, he comes from a fine family in the city of New York. This man has no place to run and he couldn't run if he wanted to.

The Court: How much is the bail he has now?

Mr. Ehrlich: About—He put up \$7500.00.

Mr. Karesh: Originally the Grand Jury set bail at \$20,000.00. The Commissioner in New York, not at our request, reduced it to \$3000.00, then there was some agreement to surrender him, or return him—Anyway, it was stipulated the bail would be \$7500.00. But I don't feel there is any substantial

question involved on the substantive count and I don't think he is entitled to bail or should be granted bail. He might become a fugitive.

Mr. Ehrlich: Your Honor, this man comes from a very reputable family. Of course that doesn't justify him in any way, but his wife was out to see me and I talked to the family maybe once or twice a week. I was on the verge of [429] saying I would guarantee his appearance, but obviously I can't cover the United States; but I am satisfied, morally satisfied, this man will be here to answer to any—at any time that the Court desires. He could have run before. He came here voluntarily. He could have disappeared before if he was going to run, and I say this man will be here. Your Honor, fix a reasonable bail which is possible for this family to raise.

The Court: I will give this further consideration. I would like to speak to the Probation Officer in connection with that matter before I rule, so I will take that under advisement.

CERTIFICATE OF REPORTER

I, Clarence F. Wight, Official Reporter, certify that the foregoing 430 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CLARENCE F. WIGHT,

[Endorsed]: Filed Oct. 10, 1949. [430]

[Endorsed]: No. 12373. United States Court of Appeals for the Ninth Circuit. John Stoppelli, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 6, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals,
For the Ninth Circuit

No. 12373

JOHN STOPPELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY AND
DESIGNATION OF RECORD RE-
QUESTED BY APPELLANT

Comes now the defendant and appellant, John Stoppelli, and hereby makes the following statement of points on which he intends to rely in this appeal.

[Title of Court of Appeals and Cause.]

AMENDMENT TO STATEMENT OF POINTS
ON WHICH APPELLANT INTENDS TO
RELY

Comes now the Appellant John Stoppelli and amends his statement of points on which he intends to rely in this appeal by adding thereto the following:

4. That the proper venue and place of trial for the substantive offenses charged against this defendant was the Southern District of New York and not the Northern District of California.

Dated this 18th day of October, 1949.

/s/ J. W. EHRLICH,

Attorney for Appellant.

Receipt of a copy of the foregoing amendment is hereby admitted this day of October, 1949.

By /s/ JOSEPH KARESH,

Asst. U. S. Attorney.

[Endorsed]: Filed Oct. 19, 1949.

No. 12,373

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN STOPPELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

J. W. EHRLICH,

512 De Young Building, San Francisco 4, California,

Attorney for Appellant.

FILED

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U. S. COURT OF APPEALS

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No. 12,373

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN STOPPELLI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF FACTS.

On October 31, 1948 the Government witness, with an informer, went to a hotel in Oakland, California and went up to room 306. As the Government witness was entering the hotel, defendant Ballard came out, entered an automobile, drove away and returned in a few minutes with defendants McDonough and Ingoglia. Defendants Ballard and Ingoglia then entered the hotel. The Government witness was at this time in Room 306 and had made arrangements with defendant Leeper to buy heroin. While the Government witness was in the room with defendant Leeper, there was a knock on the door and defendant Leeper opened the door, reached outside, bringing in

a package containing 12 letter-size envelopes in which envelopes there were other sealed cellophane envelopes containing diluted heroin. The letter-sized envelopes were of the common variety purchasable in any stationery or dime store. Defendants Ballard and Ingoglia were found immediately in the hallway.

A portion of one fingerprint claimed by the witness Greene to be that of defendant Stoppelli was subsequently found to be on the outside of one of the letter-sized envelopes; not the cellophane envelopes.

There was no evidence showing Stoppelli to have been in California on October 31st, 1948, or at any other time.

There is no evidence that Stoppelli knew any of the defendants, or that there was ever any contact between Stoppelli and defendants or their agents, either oral or otherwise.

The appealing defendant John Stoppelli, with four other defendants, was charged in the three-count indictment as follows:

First Count: That defendant John Stoppelli, along with the co-defendants named therein, did unlawfully sell, dispense and distribute 10 ounces and 436 grains of heroin in twelve (12) envelopes.

Second Count: That defendant John Stoppelli, along with the co-defendants, did fraudulently and knowingly conceal and facilitate the concealment of said quantity of heroin.

Third Count: That defendant John Stoppelli and the other four defendants conspired together to commit the substantive offenses set forth in Counts 1 and 2.

All defendants were convicted on all counts.

The defendant John Stoppelli did not take the stand.

The defendant John Stoppelli was granted a new trial on the conspiracy count.

He appeals the conviction on Counts 1 and 2.

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY AGAINST THE DEFENDANT AND APPELLANT ON THE FIRST AND SECOND COUNTS OF THE INDICTMENT.

A thorough examination of the evidence discloses no act or word on the part of John Stoppelli. He did not sell or dispense or distribute any of the twelve envelopes of heroin. Stoppelli did not at any time or place fraudulently conceal and facilitate the concealment of any quantities of heroin.

There is not one word in the evidence concerning Stoppelli knowing the other defendants, or having seen them, or having talked to them, or having been connected with them or having aided or abetted them.

There is no evidence that Stoppelli was ever in California, except for the purpose of this trial.

The evidence thus failing to disclose Stoppelli's commission of the substantive offenses, the guilty verdict must necessarily rely solely upon the statutory presumption set forth in the Harrison Narcotic Act, upon which Count 1 is based, and a similar presumption in the Jones-Miller Act upon which Count 2 is based, that one found in possession of a narcotic will be presumed to be guilty of a violation of said statute unless he satisfactorily explains the possession.

The applicability of such presumption necessarily presupposes that the evidence establishes beyond reasonable doubt the fact that defendant Stoppelli was in possession and control of the heroin mentioned in the indictment. Without such evidence, the presumption is meaningless. It is, therefore, fundamental and imperative to the Government's case that it prove Stoppelli had dominion, control and possession of the heroin.

An examination of the record fails to establish even the thinnest thread of evidence that Stoppelli was ever possessed of the heroin. The only evidence found casts but the barest suspicion on the question of Stoppelli's possession. Suspicion will not warrant conviction of crime.

The only evidence against Stoppelli (in the 400-page transcript) consists of a fingerprint impression

on one of the twelve letter-type envelopes. There is no fingerprint on the cellophane envelopes which actually contained the heroin. It is opinion evidence. The weight of this evidence only establishes that at some time one finger of the left hand of Stoppelli came into contact with the envelope in question. It establishes no more. It does not by direct evidence or inference establish that there was heroin in the envelope.

The only other evidence connecting Stoppelli is based upon conjecture, surmise and speculation by the testimony of Harold Greene, a Government witness.

Examining the evidence on this point we find the only real evidence is that the print of one finger of appellant Stoppelli was found upon an envelope, in which envelope when found there was another cellophane envelope containing heroin. Mr. Greene, a Government employee, and an eager witness, then testifies to what purports to be an expert opinion to the effect that there was a powdery substance in the envelope when the finger print was put thereon. The record shows such statement is not worthy of being classed as an opinion; it is speculation and guessing.

The testimony of the witness Greene shows it to be only a guess, as will be seen from the following quotations:

“Q. And what would you say—what kind of substance, if you know, did it contain?

A. Well, from my experience it had to be a powdery substance, for the simple reason that the

intensity of the fingerprint, the latent fingerprint on this particular envelope, shows that the right side as you look at it, or the left side of the fingerprint itself, that the duct covering a part of the delta, the duct on the ninth finger of the left hand, that when there is a powder in an envelope of any type, and especially after it has been placed in the glassine envelope and placed in this envelope, that anyone that grasps the envelope, there is a movement of the powder inside, because naturally we have to put more pressure on the holding of an object in this case with that content in the envelope than you would if the envelope was just as it is now."

(Tr. p. 264.)

Greene's answer three questions later shows that the statement "It had to be a powdery substance" is only a guess, if not untrue:

"A. In that fashion (indicating). As the movement of the powder inside the envelope or the two envelopes sort of moved, because he had to exert a little pressure. You still would not get the bulged surface or, I would say, the concavity surface of the material in the package. You would get a concavity in the package after you placed the finger by gripping it, the same as we have all had the experience of buying sugar in a bag in a store, and when you grasp the bag of sugar, your fingers to a certain extent, one side or the other, each finger will make an impression in the bag as you hold it."

(Tr. p. 265.)

Sugar is granular, not a powder; yet Greene says sugar would have the same effect he claims for a

“powdery substance”. Beans, macaroni, rubber or any other granular, soft or movable substance could have the same effect.

Everyone knows that when fingerprints are taken by the Government or by the police, a hard surface is used to obtain a perfect print. According to Mr. Greene, the Police Department would get much better prints if they had a soft substance on which the finger was placed to take the print. It is evident that Greene’s conclusion that a “powdery substance” was the base on which the fingerprint herein was made because of its intensity is unfounded.

Greene shows by his own admissions that a powdery substance is only one of hundreds of substances that could have had the same effect as the background or base for a fingerprint. His alleged “expert opinion” of a powdery substance is nothing more than wishful thinking. If we are going to speculate as to what was the base on which the alleged fingerprint was made, let us speculate on the presumption of the innocence of Stoppelli. Suppose the envelope were lying on a table. Many of us place a hand on a table when standing by it. This would furnish a hard base for the making of the fingerprint. On the other hand, suppose this envelope was on the outside of a bunch of envelopes in a store and Stoppelli was buying envelopes. He could have very easily picked up that bunch with his left hand and then replaced them; deciding to buy a different bunch. It is, therefore, evident that it is just as easy to presume that this one fingerprint was innocently placed on the envelope as

the manner in which W. Harold Greene assumes. Of course, Mr. Greene is eager to create the inference that heroin was in the one envelope when handled by Mr. Stoppelli. He has to put a powdery substance in the envelope in order to accomplish his mission as a "fingerprint expert".

The testimony that a "powdery substance" was in the envelope is thus proven to be only wishful thinking. This fact arrived at by such process cannot be the foundation for a fact that heroin was in the envelope when it was handled by Stoppelli. Such a guess by Greene is not establishing what, if anything, was in the envelope to a moral certainty and beyond a reasonable doubt. It is elementary and the authorities are clear that each fact of a chain of circumstantial evidence must be clearly established. The prosecution's case, therefore, as a matter of law failed to clearly establish that any substance, much less heroin was in the envelope when the alleged fingerprint of Stoppelli was placed on the one outside envelope.

If anything is done with this evidence, it must be resolved in favor of Stoppelli.

Furthermore, an examination of Section 174 of the Jones-Miller Act, on which Count 1 is based, discloses that the statutory presumption arises out of the following language contained therein, to wit: "where defendant is shown to have possession or to have had possession." An examination of Section 2553 of the Harrison Narcotic Act, upon which Count 2 is based, discloses the presumption arises out of the

following language: "The absence of an appropriate tax paid stamp from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found." There is, therefore, absolutely no evidence upon which a conviction of Stoppelli under Count 2 can be based since the evidence totally fails to show that even one envelope was found in the possession of Stoppelli. There is not even an inference arising from the evidence in this case to show that Stoppelli was found in possession of the heroin. In fact the very evidence introduced by the prosecution negates this proposition and shows the heroin to have been found in the possession of others. It is, therefore, inconceivable that Stoppelli can be guilty of a violation of Count 2 of the indictment.

The evidence to warrant a conviction under Count 1 of the indictment is likewise insufficient; for, as has been pointed out, there is no evidence showing Stoppelli to have had possession at any time except the opinion evidence of Green, which is nothing more than sheer speculation.

For the sake of comparison with the case at bar, Circuit Courts have held the evidence insufficient to warrant conviction in cases where the evidence is more conclusive against defendants than here.

In *Ching Wan v. United States*, 9th Cir., 35 F. (2d) 665, the appellant Wan delivered an envelope to a Government witness in Honolulu and asked the witness if he would deliver the envelope to Gum at an ad-

dress in San Francisco. The witness delivered the envelope to Gum, and a few days later met Gum in the latter's car, at which time they drove a few blocks when Gum directed the witness to enter another car driven by appellant Lett. After entering the car, the witness at his own request was driven by appellant Lett to the express office. Upon arrival appellant Lett directed the witness to get out and do as he was instructed. The appellant Lett then assisted the witness in removing the box from the car which appellant Lett had operated. The box was shipped to Honolulu, where it was seized by Government agents. As to the appellant Lett, the Court held at page 666:

“As to the appellant Lett the case is entirely different. His only connection with the transactions involved on this appeal was as above set forth. It was not shown that he had any knowledge of the contents of the box transported by him or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness Rosa, aided him in removing the box from the automobile, told him to do as instructed, and refused to wait for him at the express office when requested so to do. As said in *Sugarman v. U. S.*, CCA, 35 F. (2d) 663, just decided, ‘whatever suspicion these facts and circumstances may give rise to they are in our judgment legally insufficient to support a verdict of guilty.’ ”

In the above cited case the facts disclosed that a box of opium was in a car driven by appellant, that the appellant did handle the box containing the opium,

that he did tell the witness to do as instructed. These facts, although they only give rise to a suspicion, not warranting conviction, are, when compared with the evidence against Stoppelli, more conclusive of guilt than the facts in the case at bar. There is no evidence that the envelope herein contained heroin at the time the fingerprint was made; at the most, there is nothing but suspicion.

In *Morei v. U. S.*, 6th Cir., 127 F. (2d) 827, the court stated at page 836:

“That he was the employee of the man who bought the heroin; and that he was close to the scene of the crime is entirely explicable and consistent with his innocence; and there was no other evidence sufficient to overcome the presumption. Suspicion is not such evidence. Laying aside *unjustified and speculative inferences* a careful consideration of all of the evidence in this case relating to the defendant Evans leads to the inescapable conclusion that in going to Youngstown and back and in driving the two men to the rendezvous arranged by Morei, and in all of the other situations as disclosed by the record, he conducted himself exactly the same as he would have done had he been engaged in legitimate employment. In reviewing criminal convictions we do not pass upon the weight of the evidence. That is for the jury. But in this case there was no evidence against Evans to warrant submission of the question of his guilt to the jury, and his motion to direct a verdict of not guilty should have been granted.”

In the case at bar we have no evidence above the barest suspicion. A conviction is not warranted on in-

ference and speculation alone, without basis in fact. It may be stated as a general rule that circumstantial evidence can only warrant conviction if an inference may reasonably and logically be drawn from a proven fact which is more consistent with guilt than innocence.

In *Kassin v. United States*, 5th Cir., 87 F. (2d) 183, the Court held at page 184:

“In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but consistent with every reasonable hypothesis of innocence.

One of the prime rules in the trial of criminal cases is that circumstances when relevant and cogent may constitute evidence of guilt, but they must have a legal, as well as logical, relevancy, and they must have probative force; that is, they must point with compelling force to the facts to be proven. Circumstances which merely raise suspicion, or give room for conjecture are not sufficient evidence of guilt.”

A comparison of the facts of this case with the rules stated in *Kassin v. United States*, supra, clearly establishes that the testimony as to guilt of Stoppelli does not point with compelling force to the possession of narcotics. It is only by suspicion that we have any evidence of possession by Stoppelli.

In *Philyaw v. United States*, 8th Cir., 29 F. (2d) 225, at page 227, the court states the general rule to be:

“In a criminal case, there must be evidence of all of the material facts alleged in the indictment, or evidence from which a natural and proper inference can be drawn; that such facts actually existed. It is a well recognized rule in all jurisdictions that, to warrant a conviction upon circumstantial evidence alone, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. There is evidence from which it could be properly assumed that the defendants owned the liquor found. But wherein are the facts from which a natural inference can be drawn that he removed it or concealed it after removal *unless it be an assumption based on an assumption?*”

As set forth in *Philyaw v. United States*, supra, there must be evidence of all the material facts alleged in the indictment. In the case at bar there is no evidence whatsoever of any of these material facts, to-wit: selling, dispensing or concealing narcotics. There is no evidence of guilt even with the aid of the statutory presumption of the statute. We not only have to exercise the statutory presumption, but that presumption must itself be based upon an inference giving rise to the fact of possession, which is nothing more than an inference based upon a presumption, which, as set forth in *Philyaw v. United States*, supra, cannot warrant a conviction.

The facts here are in no sense wholly consistent with guilt and inconsistent with any other reasonable hypothesis.

It is therefore respectfully submitted that the evidence is insufficient to warrant the conviction of Stoppelli.

II.

THE DEFENDANT AND APPELLANT JOHN STOPPELLI WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE MISCONDUCT OF THE WITNESS W. HAROLD GREENE WHILE TESTIFYING FOR THE GOVERNMENT.

The Government witness W. Harold Greene was guilty of misconduct which substantially prejudiced the defendant and deprived him of a fair trial. Mr. Greene's testimony is:

“Q. Now, how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?”

A. We have a National Book, every District Supervisor in the Country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known——”

(Tr. p. 254.)

These very words are so shocking that they shriek of injustice. This is not mere harmless error, but is prejudicial error of the most flagrant nature. The law itself is imbued with abhorrence to evidence of this nature. Yet, Mr. Greene has accomplished by his very testimony what he could not do under the law.

Under no conceivable reasoning can it be said that these words did not become imbedded in the minds of the jurors. The import of these words when such testimony is taken as a whole is that the Narcotics Bureau has a record of all major known narcotic peddlers. It is the obvious inference from the words spoken by Mr. Greene that Mr. Stoppelli has a criminal record, is a man of criminal propensity, and is a known narcotic peddler.

The record (Tr. p. 254) shows that this statement was volunteered by W. Harold Greene, an experienced witness. If this answer were in direct response to a question a different situation might be presented. The fact that it was volunteered increases the error. It will be noticed in the record that the Assistant U. S. Attorney, Mr. Karesh, admonished Mr. Greene, his own witness, that he had not answered the question. The trial judge was most surprised by the statement of Mr. Greene, and recognized its prejudicial effect at once. This is shown by the somewhat lengthy statement by the trial judge at this point.

This course of conduct by the Government's witness which reeked with its prejudicial effect not only occurred once in the trial, but twice. Not having done enough damage he testifies again:

“A. In my opinion he grasped it this way (indicating), *which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type * * **”

(Tr. p. 265.)

Again, we are confronted with the fact that the Government witness pointed out to the jury that Stoppelli was a dealer in narcotics.

Add to Greene's testimony portions of the damaging opening statement made by the prosecuting attorney and it is plainly visible how the jury was influenced and prejudiced against Stoppelli.

"We will also show, ladies and gentlemen of the jury, during the course of the trial, that the defendant John Stoppelli—and we will show it by fingerprint evidence, conclusive fingerprint evidence, that a quantity of that heroin in question in that envelope, in one of the envelopes, was handled by the defendant John Stoppelli." (Tr. p. 34.)

The prosecuting attorney, apparently not satisfied, restates his position:

"On the theory of law of aiding and abetting, we will show that all of them violated the Harrison Narcotic Act, all of them violated the Jones-Miller Act, and all of them conspired to violate these acts, and we will also ask you to bear in mind during the course of the trial, that the Government does not have to show that John Stoppelli handled all of the narcotics in the envelopes. If he handled the narcotics in one envelope, if he handled one ounce of narcotics, or a half ounce, or 5 grains, it is as though he handled, possessed, concealed, aided and abetted in the concealment and the sale of all the narcotics in all of the envelopes."

(Tr. p. 34.)

To tie-in Stoppelli with the testimony of Greene, the prosecuting attorney said further :

“The offenses charged took place in Oakland and in other places. Now, members of the jury, I ask you to bear in mind throughout the course of the presentation of the Government’s case that if a man puts in action a criminal force, let’s say in New York, in the State of New York, and ultimately the crime is consummated in the State of California, even though the man is in New York, because he set the criminal force loose and the force was consummated or the act was consummated in California, he is guilty of a violation of the law in California.” (Tr. p. 30.)

There is not one word of testimony in the record to substantiate the claim of the prosecuting attorney.

“* * * that anyone who aids and abets in the commission of a crime is as guilty as the person who commits the crime. In other words, if there is a person in the State of New York who sends narcotics to the State of California, and those narcotics are possessed in California and are sold in California, that person who sends the narcotics to California is as guilty as the person who possesses the narcotics in California and who sells the narcotics in California, and is likewise guilty of a criminal conspiracy to violate the Act.”

(Tr. pp. 30-31.)

That these words would prejudice a defendant is obvious. They are all the more shocking in the case of defendant Stoppelli when we consider the thin, if any, evidence offered to prove his guilt.

As is said in *Templeton v. United States*, 6th Cir., 151 F. (2d) 706, the evidence of Stoppelli's guilt was not so overwhelming as to render harmless the prejudicial nature of this testimony.

We cannot explore the minds of the jurors, nor does the law require the defendant to do so to prove in fact that these words influenced the verdict. It is sufficient if their probable effect would be to prejudice the minds of the jurors against the defendant. There is only one logical deduction, and that is, that the jury could not erase the words spoken by Greene.

In *Kotteakos v. United States*, 328 U. S. 750 at page 765, the court says:

“The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.”

If a grave doubt is raised, the conviction cannot stand. The words spoken by Greene not only raise a great doubt, but the evidence introduced, standing alone and apart from the error, consists of only speculative inferences.

The severity of the words of the witness Greene remain in effect all the more prejudicial because of their general scope, namely, that every District Narcotics Supervisors' Office in the country had a record of Stoppelli. We cannot for a moment assume (where the liberty of the defendant is at stake) that these

words did not prejudice and influence the minds of the jurors.

The law itself will not assume such a fact and where an error of the flagrant nature of the words spoken by Greene exists, the court will not assume that a mere instruction to the jury to disregard the remarks will in itself cure the harmful effect of such evidence.

The only logical inference that can be drawn is that these words continued to influence the jurors after they retired for their deliberations and that the deliberations were influenced in view of the unsubstantial nature of the evidence in this case. The logical inference is that defendant Stoppelli would have in all probability been acquitted but for the prejudicial effect of these words on the jurors.

In *Hatchett v. United States*, 293 Fed. 110, the defendant was prosecuted for larceny. The arresting officer testified that he obtained a photograph of a party by the name of John Brown from a gallery and that after obtaining the picture he confronted the defendant with it and the defendant admitted it was he. The court at page 1012 stated:

“While there may have been and probably was, competent evidence warranting conviction, it would be going far to say that the appellant was not prejudiced by the admission of this incompetent evidence. He was entitled to a fair and impartial trial and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned

the rogues gallery, in connection with his arrest in Philadelphia for a similar offense; in other words, that with criminal propensities, he had operated elsewhere and under another name."

The evidence in this case prejudiced Stoppelli in every respect the defendant was prejudiced in the *Hatchett* case.

In *Smith v. United States*, 9th Cir., 10 Fed. (2d) 787, a narcotics case, the defendant was charged with selling narcotics and evidence was introduced to show that the defendant had in the past been so engaged. The court stated at page 788:

"The effect of the admission of the testimony so complained of was to show or tend to show against the accused the commission of crimes independent of that for which he was on trial."

In 328 U. S. 750, *Kotteakos v. United States*, the Supreme Court held at pages 764 and 765:

"If when all is said and done, the conviction is sure that error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno v. U. S.*, supra, at 294. But if one cannot say, with fair assurance, upon pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was

enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so or if one is left in grave doubt, the conviction cannot stand."

And further in *Gold v. United States*, 2nd Cir., 26 F. (2d) 185, the court stated at page 186:

"As stated in *People v. Caruso*, 246 New York 437, 159 N. E. 390, 'the greater the doubt of guilt, the more likely that prejudice results from errors in the trial.' See *Fliashnick v. U. S.*, 223 F. 736 (C.C.A. 2) the Government's case was not so clear that the error can be deemed unsubstantial."

In *United States v. Dressler*, 7th Cir., 112 F. (2d) 972, the jury was inadvertently allowed to take to the jury room a criminal record on file in the U. S. Bureau of Investigation, Department of Justice. At page 977, the court stated:

"The Government does contend, however, that the cause of defendant was not prejudiced by the consideration of such information by the jury.

It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

The court further at page 977 quoting from *Boyd v. United States*, 142 U. S. 450, stated:

“Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.”

The court further at page 978 stated:

“In *Little v. U. S.* the following statement of the court makes the governing rule clear: “* * * Where error occurs, which, within the range of a reasonable possibility, may have effected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence the verdict. * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.”

In *Middleton v. United States*, 8th Cir., 49 F. (2d) 538, the court stated at page 540:

“A consideration of all of the evidence leads to the conclusion that the prejudice against the defendant was not removed by the laudable endeavor of the court to withdraw the evidence or by the instruction that it be disregarded.”

In *Sang Soon Sur v. United States*, 9th Cir., 167 F. (2d) 431, the prosecution was for income tax evasion and evidence admitted showed that defendant was convicted for possession of opium. The court held at pages 432 and 433:

“Evidence of the character complained of in this case has been held to be of such a prejudicial character that cautionary instructions on the part of the court to disregard it after it has been erroneously introduced cannot cure its harmful effect. *Boyd v. U. S.* 142 U. S. 450, 458, 12 S. Ct. 292, 35 L. Ed. 1077.”

In *Templeton v. United States*, 6th Cir., 151 F. (2d) 706, the court at pages 707 and 708 stated:

“Little need be said upon the question of whether the improper evidence was prejudicial. The evidence of appellant’s guilt was not so overwhelming as to render harmless the incompetent evidence complained of without any foundation in fact for showing such a connection with appellant, who was charged with a violation of the liquor laws, with Carter, a reputed criminal of the same type. Had it not been admitted the defense of an alibi would have had a basis sufficient to justify the jury in returning a verdict of not guilty.”

An examination of the above cases clearly indicates that the error complained of was so prejudicial to his rights to a fair trial that the conviction under counts 1 and 2 must necessarily be reversed.

III.

THAT THE PROPER VENUE AND PLACE OF TRIAL FOR THE SUBSTANTIVE OFFENSES CHARGED AGAINST THIS DEFENDANT WAS THE SOUTHERN DISTRICT OF NEW YORK, AND NOT THE NORTHERN DISTRICT OF CALIFORNIA.

There is a total failure of proof of venue to establish jurisdiction of the District Court for the Northern District of California. No evidence whatsoever was introduced to prove venue in the case at bar. The proper venue and place of trial for the substantive offenses charged against defendant Stoppelli was the Southern District of New York, and not the Northern District of California. There is not one line of evidence in the record to show that defendant was ever in the jurisdiction of the Northern District of California except for the purpose of this trial. It is the fundamental right of the defendant to be tried within the jurisdiction of a court in which the alleged crime was committed. Rule 18 of the Federal Rules of Criminal Procedure so provide and this right is guaranteed to the defendant by the Sixth Amendment to the Constitution of the United States.

In order to sustain the conviction of Stoppelli, the court would necessarily have to infer: first, that Stoppelli had possession of the envelope in the Northern District of California; and second, in order to warrant conviction would have to infer that heroin was contained in the envelope, which would be nothing but an inference based upon an inference.

If we presuppose possession, which we would necessarily have to do, the question then arises as to

whether the statutes can be interpreted to raise a presumption of venue. A careful examination of the statutes upon which Counts 1 and 2 are based discloses that the language of these statutes fail to raise any presumption of venue. This question was considered by the 9th Circuit Court in *Mullaney v. United States*, 82 Fed. (2d) 638, in which case the court at page 641 stated:

“This court expressly held in *Casey v. U.S.*, 20 F. (2d) 752, that the presumption contained in the statute extended also to venue. This was approved on appeal *Id.*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632.”

It is respectfully submitted that the case of *Mullaney v. United States* did not intend to lay down a general rule that there would be a presumption of venue in every case in the total absence of any proof thereof.

It is noted that the *Mullaney* case is based on the decision rendered by the 9th Circuit Court in *Casey v. United States*, 20 F. (2d) 752, as upheld by the Supreme Court in 276 U.S. 413. A careful examination of the opinion rendered by Justice Holmes in that case discloses that the court stated as follows at pages 417 and 418:

“But we are of the opinion that *upon the facts of this case the court was right*. If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would and shortly thereafter did, furnish it, inference that he bought it in Seattle is strong, and it is reasonable to suppose that if attention had been

called to the point the inference could have been made stronger still.”

It is respectfully pointed out that the Supreme Court in discussing *Casey v. United States*, supra, specifically held that under the facts of that case the court was right and then went on to discuss the inference arising that he bought the drug in Seattle. It is therefore respectfully submitted that the Supreme Court did not intend to approve the *Casey* case as standing for the all conclusive proposition that the statutory presumption contained in the statute was equally applicable to venue as it was to guilt of the substantive offenses contained therein. The approval of the *Casey* case by the Supreme Court stands for no more than the proposition that the Circuit Court in the *Casey* case was right on the particular facts of that case.

If the Supreme Court intended to approve the *Casey* case as standing for the proposition that there was a statutory presumption of venue in the total absence of proof thereof, the language referring to the particular facts of the case and the inferences arising therefrom is meaningless and superfluous. It is felt that the *Mullaney* case in line with the *Casey* case intends to stand for no more than the proposition that a presumption will arise in the absence of proof of venue only when an inference of venue can be drawn from the particular facts of the case.

In the case at bar there is no evidence whatsoever that Stoppelli was ever within the Northern District

of California until he voluntarily entered the District for the purposes of this trial. There is therefore nothing in the case at bar upon which an inference of venue can be based. It is, therefore, felt that the rule of law as set forth in *Brightman v. United States*, 8 Cir., 7 F. (2d) 532, is applicable under the facts of the case at bar. In *Brightman v. United States*, supra, the court set forth the rule of law to be as follows at page 534:

“The presumption of the statute alone, however, was not sufficient for conviction. Before the defendant could properly be convicted, it was necessary for the Government to go further and prove that venue was the Western District of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the 6th Amendment to the Constitution of the United States which provides: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.’”

The *Brightman* case quoted as follows from *Vernon v. United States*, 146 Fed. 121, stating:

“In the *Vernon* case this court said ‘Under this constitutional provision the venue is as material as any other allegation in the indictment and the burden to prove it rests upon the Government.

It might be claimed that the prima facie evidence arising under the statute renders proof of venue unnecessary. We do not think the presumption of prima facie evidence of statute in-

cludes the venue. The wording of the statute does not indicate such an intention on the part of Congress.' ”

In a very recent case decided in 1949, *United States v. Jones*, 7th Cir., 174 F. (2d) 747, the court at pages 748 and 749, stated:

“The motion for a directed verdict raises the question as to sufficiency of the evidence to support the verdict of a jury or findings of the court. One of the things that the Government has the burden of proving is venue. It is an essential part of the Government’s case. Without it there can be no conviction.”

“We pass to the sufficiency of the proof of venue. Venue does not have to be proved by direct and positive evidence. If upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient.”

It is respectfully submitted that under the facts of the case at bar, the rule of law as established by the above cited cases is applicable, namely, that there must be some evidence of venue in order to warrant a conviction of the defendant Stoppelli.

Wherefore, it is respectfully submitted that a new trial should be granted to the appellant.

Dated, San Francisco, California,
December 14, 1949.

J. W. EHRLICH,
Attorney for Appellant.

No. 12,373

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN STOPPELLI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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PAUL P. O'BRIEN,

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No. 12,373

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN STOPPELLI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the defendant, after a jury trial, of a violation of the Harrison Narcotic Act (26 U.S.C.A. 2553 and 2557) and of a violation of the Jones-Miller Act. (21 U.S.C.A. 174.)

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE.

Five defendants, including appellant, were indicted in the United States District Court for the Northern District of California in an indictment in three counts,

the first count charging a violation of the Harrison Narcotic Act, the second count charging a violation of the Jones-Miller Act, and the third count charging a violation of the conspiracy statute. The appellant made no preliminary motions. After a trial by jury, all defendants were found guilty on all counts. All defendants made motions for a judgment of acquittal at the end of the Government's case and at the close of all the evidence. All defendants moved for a new trial and, with the exception of the trial Court granting appellant's motion for a new trial on the conspiracy count of the indictment, the third count, all motions were denied. The appellant was sentenced to imprisonment for a period of six years and to pay a fine of \$100.00. The said sentence was imposed as follows: Imprisonment for a period of five years on the first count of the indictment, and imprisonment for a period of six years and a fine of \$100.00 on the second count of the indictment, terms of imprisonment to run concurrently. (Tr. 420-421.)

The first two counts of the indictment, of which appellant stands convicted, read as follows:

“First Count: (26 U.S.C. Sections 2553 and 2557 (Harrison Narcotic Act));

The Grand Jury Charges: That Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli (whose full and true names are, and the full and true name of each of whom is, other than hereinabove stated, to said Grand Jury unknown, hereinafter called ‘said defendants’), on or about the 31st day of October, 1948, in the City of Oakland, County of Alameda, State of California, within

said Division and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes, containing approximately 10 ounces and 436 grains of heroin.

Second Count: (Jones-Miller Act, 21 U.S.C. Section 174) ;

The Grand Jury further charges: That the said defendants, Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at the time and place mentioned in the first count of this indictment, within said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes containing approximately 10 ounces and 436 grains of heroin, and the said heroin had been imported into the United States of America, contrary to law as said defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli then and there knew." (Tr. 2-3.)

In his "Statement of Facts", appellant has omitted the following uncontradicted facts:

1. The 12 envelopes inside of the package containing the narcotics were of the same size, length, width, color and appearance (Tr. 152).
2. Appellant came from New York (Tr. 55).
3. The narcotics came from New York, according to the codefendant Leeper in a statement he

made to the undercover operative immediately prior to the termination of the criminal design (Tr. 77).

4. The heroin in each envelope contained 80 per cent heroin, and the balance, a reducing sugar (Tr. 37-38).

5. The portion of the fingerprint on one of the envelopes containing the heroin, which the Government fingerprint expert, W. Harold Greene, positively identified as that of the defendant (Tr. 253), contained 14 characteristics similar to that of the known fingerprint of the appellant (Tr. 249). Six such characteristics have been found to be sufficient for identification purposes (Tr. 249).

6. The appellant, when he placed his fingerprint on the envelope, was holding the envelope in his hand at the time the envelope contained a powdery substance (Tr. 264).

7. The print of the appellant was placed on the envelope in question, not more than four weeks prior to the time the envelope containing the narcotics was delivered to the undercover operative (Tr. 261).

8. The date of the offenses is on *or about* October 31, 1948. (Italics supplied.)

9. The conspiracy count, which is not our concern in this appeal, charged a conspiracy not only between appellant and the other four co-defendants to commit the substantive offenses set forth in counts one and two, but with *others to the Grand Jury unknown*. (Italics supplied.)

Furthermore, appellee challenges the assertion made by appellant in his "Statement of Facts" that

there is no evidence that he was in California on October 31, 1948, or at any other time, or that there is no evidence showing that there was ever any contact between the appellant and the codefendants, or their agents, either oral or otherwise. Appellant's print on the envelope containing narcotics, placed there within a relatively short time before being delivered to the undercover operative in Oakland, California, on October 31, 1948, is strong proof that he was in California about the time mentioned in the indictment, and a strong link connecting him, or his agents, with the codefendants, or their agents.

THE HARRISON NARCOTIC ACT.

The Harrison Narcotic Act, under which the appellant is charged in the first count of the indictment, reads in pertinent portion as follows:

“It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.” (26 U.S.C.A. 2553 (a)).

THE JONES-MILLER ACT.

The Jones-Miller Act under which the appellant is charged in the second count of the indictment reads in pertinent portion as follows:

“If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.” (21 U.S.C.A. 174).

CONTENTIONS OF APPELLANT.

The appellant contends that his conviction on the first and second counts of the indictment should be reversed on the following grounds:

1. The alleged insufficiency of the evidence.
2. The alleged misconduct of the Government fingerprint expert.
3. The alleged failure to prove venue.

ARGUMENT.

In beginning this discussion appellee invites this Honorable Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the Government to support it, *Glasser v. United States*, 315 U.S. 60, 80, as well as to Rule 52(a) of the Federal Rules of Criminal Procedure, which reads as follows:

“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”

I.

THE ALLEGED INSUFFICIENCY OF THE EVIDENCE.

Appellant contends that there is no evidence that he sold, dispensed or distributed any heroin, in violation of the Harrison Narcotic Act. Since the statute is in the disjunctive the Government needs only prove a sale *or* a dispensing *or* a distribution. *Miller v. United States*, C.C.A. 7, 53 F. (2d) 316, 317.

Appellant also contends that there is no evidence that he fraudulently concealed or facilitated the concealment of any heroin, in violation of the Jones-Miller Act. Evidence that appellant was *or had been* in possession of the heroin is sufficient to sustain a conviction under this statute.

Although it is unnecessary to show that the appellant had possession of all the narcotics mentioned in the indictment, there is sufficient evidence to sustain such a conclusion. The undisputed testimony shows

that all of the twelve envelopes contained 80 per cent heroin, and the balance, a reducing sugar (Tr. 37-38), and that the twelve envelopes were of the same size, length, width, color and appearance. (Tr. 152.) Thus, one may logically conclude that, since appellant handled one envelope containing narcotics, he handled them all. That he handled one envelope containing narcotics is conclusively shown by the uncontradicted testimony of W. Harold Greene, the government finger-print expert, that appellant placed his finger-print on the envelope when he held it in his hand and when it contained a powdery substance, it being remembered that heroin is a powdery substance. (Tr. 264.) Since the heroin at one time was in appellant's possession and shortly thereafter was found in the possession of one of the codefendants, it is reasonable to assume that either appellant dispensed or distributed the narcotics to his agent who, in turn, transferred the narcotics to one or more of the codefendants, or that appellant transferred them to one of the codefendants, or one of their agents. This constitutes a violation of the Harrison Narcotic Act as set forth in the first count of the indictment.

Appellant has been shown by overwhelming evidence to have had possession of the heroin. This evidence is fingerprint evidence and a fingerprint identification is much more satisfactory even than eyewitness identification. In *Parker v. The King*, 14 C.L.R. 681, 3 B.R.C. 68 (High Court of Australia), cited in *State v. Steffen* (Sup. Ct. of Iowa), 230 N.W. 536, it was said:

“A fingerprint is therefore in reality an unforgeable signature. That is now recognized in a large part of the world.”

See also

United States v. Kelly (C.C.A. 2), 55 F. (2d) 67;

Duree v. United States (C.C.A. 8), 297 Fed. 70;

Commonwealth v. Albright, 101 Sup. Ct. (Penn.) 317;

Grice v. State (Crim. App. Ct. Texas), 151 S.W. (2d) 211,

and cases cited therein.

The Jones-Miller Act does not, as can be seen, require an eyewitness account of possession. Possession may be shown by circumstantial evidence. There is no stronger evidence of this kind than the uncontradicted and undisputed testimony of a fingerprint expert, for in a sense, fingerprint evidence is “direct” evidence. The following language, therefore, from the Jones-Miller Act is sufficient to sustain appellant’s conviction under the second count of the indictment:

“* * *. Whenever on trial for a violation of this section the defendant is shown to have *or to have had* possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.” (Italics supplied.)

Appellant contends that there is not one word in the evidence that Stoppelli knew the codefendants, or

saw them, or talked with them, or was connected with them. The heroin which he handled is the connecting link and that connecting link which also answers appellant's contention that he was never in California. The uncontradicted testimony of the Government fingerprint expert is not, as appellant suggests, a thin thread of evidence, giving rise only to the barest of suspicion, but in truth and in fact is that conclusive type of evidence which destroys not only any vestige of reasonable doubt but also any possible or even fanciful doubt. Appellant challenges the testimony of the fingerprint expert in his opening brief. Appellant's counsel vigorously, but without success, challenged the fingerprint expert when he cross-examined him lengthily during the course of the trial. The appellant, however, did not, during the course of the trial, call in an expert of his own to testify although he had the opportunity to do so; his counsel was furnished with enlargements of the known print, and the print found on the envelope containing narcotics. (Tr. 255-256.) The reason is, of course, obvious. He knew that any expert which he might call could not shake the testimony of Mr. Greene. That Mr. Greene is a fingerprint expert can not be challenged in the light of his long training and experience in this field of identification. (Tr. 245-247.) Appellant argues, on page 9 of his opening brief, that the testimony of Mr. Greene is nothing more than "sheer speculation". The jury found otherwise, and its decision was the only one it could have properly reached.

Appellant, in his opening brief, in support of his proposition that Appellate Courts have reversed convictions where the evidence was much stronger than the evidence in our case at bar, cites the following authorities:

Ching Wan v. United States, 9th Cir., 35 F. (2d) 665;

Morei v. United States, 6th Cir., 127 F. (2d) 827, 836;

Philyaw v. United States, 8th Cir., 29 F. (2d) 225, 227;

Kassin v. United States, 5th Cir., 87 F. (2d) 183, 184.

Appellee has no quarrel, generally, with the correctness of these decisions. These decisions, however, can be easily distinguished from our case at bar.

In *Ching Wan v. United States*, supra, a codefendant who had merely driven an automobile in which the defendant transported a box containing narcotics was convicted of facilitating the transportation of narcotics. This Court properly reversed his conviction for insufficiency of evidence because it was not shown that he was more than a mere "conduit" and there was no evidence of guilty knowledge on his part. Here the case is entirely different. The appellant insists that there is nothing but suspicion that the envelope herein contained heroin at the time the fingerprint was made. Appellee asserts that it is inherently improbable that the powdery substance which appellant handled when he placed his fingerprint on the envelope was anything other than the heroin which was

later delivered by one of the codefendants to the undercover operative in Oakland. What is inherently improbable, of course, under the law may be completely disregarded. *In re Leslie*, 119 Fed. 406, 408. It is, however, a reasonable inference that a person who acts as a mere "conduit" in the transportation of a box does not know its contents, as it is also a reasonable inference that a defendant who handles small envelopes with narcotics in them has guilty knowledge of their contents.

The case of *Morei v. United States*, supra, is of little assistance to the appellant herein, because the defendant Evans, whose conviction was reversed, was not shown to have had possession of the narcotics. Evans was merely an employee of one of the defendants who did have possession of the narcotics and, as the Appellate Court stated, in relation to his activities:

"* * * he conducted himself exactly the same as he would have done had he been engaged in legitimate employment."

In this case, it is not amiss to point out that the Appellate Court reiterated a settled rule of law that "unjustified and speculative inferences" must be laid aside. This language strengthens appellee's assertion heretofore made. Certainly any suggestion that the powdery substance in the envelope, when the appellant placed his fingerprint thereon, was not heroin, is an unjustified and speculative inference, which must be completely disregarded.

Appellant's reliance on the case of *Philyaw v. United States*, supra, is difficult to understand unless it was done for the purpose of reiterating a legal principle about which there is no dispute. In this case the defendant, whose conviction of illegally removing and concealing untaxed whiskey was reversed, was never shown to have had possession of the contraband. In setting forth the grounds for its reversal of the conviction, the Appellate Court said, at page 227, as follows:

"There is no direct evidence that the defendant had anything to do with the removal or concealment. The most that could be said is that the whisky must have been removed by some one from the place where distilled. The only evidence connecting the defendant with the charge is that, a few days before the whisky was found, he said he had some liquor to sell, and sold some, which he obtained from this house; that the whisky was found in a house located on a plantation owned by him, and that in several houses located on the same plantation was evidence that liquor had at some recent time been distilled therein."

* * * * *

"* * * From these facts it is just as probable that the liquor was removed and placed in the attic of this house by some person other than the defendant as that it was removed and so placed by him.

There is evidence from which it could be properly assumed that the defendant owned the liquor found. But wherein are the facts from which a natural inference can be drawn that he removed

it or concealed it after removal, unless it be an assumption based upon an assumption?"

Certainly no one can argue that it was just as probable that the fingerprint on the envelope containing the heroin belonged to some person other than the appellant, or that the powdery substance in the envelope, when appellant placed his fingerprint thereon, was a substance other than heroin. Accordingly, appellant accomplished nothing when, quoting from the *Philyaw* case, he italicized the words "an assumption based on an assumption".

Appellant relies on the case of *Kassin v. United States*, supra. In this case the defendant was jointly indicted with several others for misapplying funds and falsifying records of a national bank, and for conspiracy to misapply these funds and falsify these records. Appellee is in complete accord with the legal principle of this case, as set out at page 12 of appellant's opening brief, but the factual situation in the *Kassin* case, rendering it inapplicable to our case at bar, may be clearly shown by reference to this language of the Appellate Court in its decision, at page 185:

"Examining and appraising these circumstances, individually and together, by the rules governing criminal trials, we find them wholly wanting in probative relevancy and force. Appellant's being in Florida and registering under assumed names standing alone had neither logical nor legal relevancy to the charge for which he was on trial. He may have had any number of rea-

sons for his presence in Florida, and for his conduct there. His taking out of a deposit box in the bank in Florida, still under an assumed name, by itself had absolutely no tendency to prove his guilt. Relevancy is not supplied, probative force is not given to these circumstances by the additional proof that some of those charged with him had deposit boxes in the same bank and some of them were registered at the same hotels at which he registered at or about the same time."

Furthermore, the *Kassin* case contains the following language, at page 184, which is particularly damaging to the appellant herein:

"Circumstantial evidence can indeed force a chain of guilt and draw it so tightly around an accused as almost to compel the inference of guilt as matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences."

The fingerprint of Stoppelli on the envelope containing the narcotics, the fact that he handled the envelope when it contained a powdery substance, the fact that heroin is a powdery substance, the fact that all of the 12 envelopes containing the narcotics were of the same kind and description, the fact that each envelope contained the same percentage of heroin and the same percentage of a reducing sugar, the fact that the appellant came from New York, the fact that there is evidence that the narcotics which were delivered to the undercover operative in Oakland came

from New York, the fact that the amount of narcotics involved was large, the fact that the narcotics were delivered to the undercover operative by a codefendant within a relatively short time after Stoppelli placed his fingerprint on one of the envelopes—all of these facts constitute circumstantial evidence forging a chain of guilt so tightly around the appellant as to almost compel the inference of guilt as a matter of law.

In *Pitta v. United States*, 164 F. (2d) 601, 602, this Honorable Court said:

“* * *. Possession of any sort is sufficient to raise the presumption and to place upon the accused the burden of explaining the possession to the satisfaction of the jury. *Ng Choy Fong v. United States*, 9 Cir., 245 F. 305, certiorari denied 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539; *Yee Hem v. United States*, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904. *The aim of the statute is to stamp out the existence of narcotics in this country except for legitimate medical purposes.* *Yee Hem v. United States*, supra. It follows that the evidentiary consequence flowing from proof of possession was here operative.” (Italics supplied.)

That full force and effect are being given to the avowed purpose of Congress to wipe out the illicit traffic in dangerous drugs, may be seen by reference to countless decisions of Appellate Courts upholding convictions in the lower Courts under the Narcotic Statutes.

See *Camou v. United States*, 276 Fed. 120, in which a conviction for concealment was sustained by this

Honorable Court, where the primary evidence disclosed that the defendant had keys to a trunk in which the narcotics were hidden.

See *Pon Wing Quon v. United States*, 111 F. (2d) 751, wherein this Court held that proof that the defendant placed a customs label on a trunk containing opium with the probable effect of preventing customs inspection, was sufficient proof of the *corpus delicti* to authorize the admission of defendant's confession.

See also *Brady v. United States*, 148 F. (2d) 394, wherein the evidence was held sufficient by this Court to sustain a conviction of defendant and his wife for receiving, concealing and transporting heroin, where, immediately prior to the arrest of defendant's wife, the defendant threw the package containing the narcotics on to the floor of a public garage.

See also the following decisions of this Honorable Court:

Sam Wong v. United States, 2 F. (2d) 969;

Rosenberg v. United States, 13 F. (2d) 369;

Hooper v. United States, 16 F. (2d) 868;

Borgfeldt v. United States, 67 F. (2d) 967;

Wong Chin Pung v. United States, 142 F. (2d)

57.

In view of the foregoing, and particularly in light of the statutory presumptions arising in favor of the Government under the Harrison Narcotic Act and the Jones-Miller Act, the inescapable conclusion inevitably follows that on the basis of the fingerprint expert's testimony alone the evidence is sufficient to sustain the verdict of the jury on both counts of the indictment.

II.

**THE ALLEGED MISCONDUCT OF THE GOVERNMENT
FINGERPRINT EXPERT.**

Appellant complains that the following testimony given by W. Harold Greene, the Government fingerprint expert, which he cites at pages 14 and 15 of his opening brief, deprived him of a fair trial:

1. "Q. Now how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?

A. We have a national book, every district supervisor in the country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known——" (Tr. 254.)

2. "A. In my opinion he grasped it this way (indicating), which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type——" (Tr. 265.)

Appellant assumes from the first answer of Mr. Greene that the jury inferred that appellant was a major known narcotic peddler. No such inference is warranted. As a matter of fact, it appears that not even the trial judge received such an impression as may be seen by reference to his remarks made at the time the appellant, a five-time convicted felon, requested his release on bail pending appeal:

"I know nothing about this particular defendant other than that what has been shown in the trial of the case." (Tr. 380.)

"Do you have that record?" (Tr. 381.)

Counsel for appellant suggests in his opening brief that the prosecuting attorney admonished his own witness. The record will show that this is not correct. All he said to Mr. Greene at that juncture was: "Just a minute, pardon me——" It was counsel for the appellant who did the admonishing, and after such admonishment by him the Court instructed the jury:

"Yes. I first instruct the witness to confine his answers to questions. Don't go beyond the scope of the question asked by counsel. I strike the answer this witness just made in so far as he made an answer, and I instruct the jury to entirely disregard the answer which I have just stricken from the record. Any and all matters that are stricken from the record must be entirely disregarded by the jury. Proceed." (Tr. 254.)

It is highly significant that Mr. Greene used the phrase "*all of* the major known——" (italics supplied) and not the phrase *of all* the major known——, giving rise to the inference that the words "major known" were to be followed by these words: other law enforcement officials who likewise had the national book. This, however, is only conjecture on the part of the appellee, but conjecture more logical and compelling than the sheer unfounded speculation indulged in by counsel for the appellant as to what inference the jury actually drew from Mr. Greene's remarks.

In this connection, appellee calls attention to the following remarks addressed by the trial judge to counsel for appellant at the time he denied appellant's renewed motion for the mistrial, remarks which con-

vincingly destroyed any argument made by the appellant that Mr. Greene's unfinished answer deprived appellant of a fair trial:

"The Court. It might be anything. Don't you think that we have got to assume that a jury of twelve men and women who are sworn to try the case solely upon the evidence and upon the instructions of the Court that when the Court specifically, definitely instructs that jury to entirely disregard a statement of that kind, having in mind the statement is merely something you have to stretch to a conclusion that is not expressed by the witness—don't we have to assume that a jury is going to perform that solemn obligation in determining the guilt or innocence of a defendant as the law request them to determine it?" (Tr. 303.)

* * * * *

"The Court. He did not necessarily say, or the inference is not necessarily drawn, that he was referring to the major known dealers in narcotics. The major known sources of narcotics, the major known methods of distribution, sale, and so forth—we do not know what he had in his mind, and I do not think that sort of statement is sufficient to warrant a court in declaring a mistrial. I think the matter has been eradicated in the instruction I have given to this jury, and I am going to assume that the jury is composed of twelve fair and impartial men and women with a conscientious determination to do their duty as they should do it. The motion for a mistrial will not be granted." (Tr. 305.)

These remarks of the trial judge are all the more compelling when it is realized that no statement or sug-

gestion was ever made by Mr. Greene, or anyone else, in the presence of the jury as to what were the contents of the book in question.

Appellant complains in his brief, as hereinabove indicated, about this phrase spoken by Mr. Greene: "men of experience of that type". These words, when taken in conjunction with the rest of the answer, indicate nothing more, perhaps, than the fact that appellant might be skilled in the art of placing things in envelopes. As a matter of fact, the phrase would not necessarily have to refer to appellant. Certainly there is nothing in Mr. Greene's answer to even remotely suggest that the appellant was a man with criminal propensities, or that he was skilled in the art of handling narcotics. Had counsel for the appellant not interrupted the direct examination of Mr. Greene with the question, "What fashion was that?", the prosecution, after Mr. Greene had answered counsel for the appellant, might not have asked the next question which elicited the answer to which appellant now takes exception. (Tr. 265.) Furthermore, if there was any possible error on this score, the Court's cautionary instruction to the jury, when the remark was ordered stricken (Tr. 266), and his instruction in this regard when he gave his final charge to the jury (Tr. 356), was sufficient to cure that error. (Tr. 266.) That the appellant himself thought very little of the incident may be seen by a careful reading of the transcript of record which discloses that, after his original brief objection, he never mentioned the matter again, not even when he renewed his motion for a mistrial, nor when he moved for a judgment of

acquittal, nor when he moved for a new trial. The first inkling the prosecution received that appellant was taking a very serious view of this latter remark of Mr. Greene was when he read it, couched in extremely sharp language, in appellant's opening brief.

Appellant now, for the first time, complains, at pages 16 and 17 of his opening brief, of certain statements made by the prosecuting attorney in his opening address to the jury. How the appellant can say that these remarks are prejudicial and "shocking", is beyond understanding, when a reading of the following applicable statute shows them to be a correct statement of the law:

"Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." (18 U.S.C.A. 2.)

In support of his contention that the remarks of Mr. Greene constituted reversible error, and that no cautionary instructions of the Court could cure what he considers to be error, the appellant relies on the following cases wherein the convictions were reversed:

Kotteakos v. United States, 328 U.S. 750, 764, 765;

Hatchett v. United States, 293 Fed. 110 (should be page 1010);

Smith v. United States, 9th Cir., 10 F. (2d) 787, 788;

Gold v. United States, 2nd Cir., 26 F. (2d) 185, 186;

United States v. Dressler, 7th Cir., 112 F. (2d) 972, 977 and 978, citing *Boyd v. United States*, 142 U.S. 450;

Middleton v. United States, 8th Cir., 49 F. (2d) 538, 540;

Sang Soon Sur v. United States, 9th Cir., 167 F. (2d) 431, 432, 433;

Templeton v. United States, 6th Cir., 151 F. (2d) 706, 707, 708.

Appellee does not challenge the correctness of these decisions. Appellee, however, says of these decisions, as of the other cases heretofore cited by appellant, that the factual situations therein are not analogous, or even slightly comparable, to the factual situation in our case at bar.

In the case of *Kotteakos v. United States*, *supra*, the defendants were charged with conspiracy to violate the National Housing Act. The Supreme Court, at page 763, after citing *Weiler v. United States*, 323 U.S. 606, 611, to the effect that it is not the Appellate Court's function to determine guilt or innocence, held in substance that it was prejudicial in the light of the trial Court's instructions to join unconnected conspiracies into a general conspiracy charge, and, commenting on the "harmless error" statute, held that the error was fatal. The Supreme Court, however, at page 769, citing *Bollenbach v. United*

States, 326 U.S. 607, 613, seemed to suggest that if the jury had not been misled by the misdirection of the trial Court and the circumstances of this complicated case, their decision might have been otherwise. See also *Berger v. United States*, 295 U.S. 78, referred to in the majority, as well as in the dissenting, opinions.

In *Hatchett v. United States*, *supra*, over objection of counsel, testimony was elicited from the arresting officer by the prosecution that the defendant, who was on trial for larceny, had his picture in the "rogues' gallery", indicating that he was a man of criminal propensities.

In *Smith v. United States*, *supra*, a narcotic case, the defendant, on being asked his occupation by the prosecution and on replying that his business was selling sandwiches, was then asked that, outside of that occupation, was he not engaged in another business. After the defendant replied in the negative, the prosecution, in rebuttal, called witnesses who testified that the defendant's business was that of selling drugs. The Court in its instruction charged the jury that this rebuttal evidence as to the occupation of the defendant was to be regarded only as affecting his credibility. The Appellate Court held that the defendant's statement that his business was selling sandwiches should have ended the matter, and that the effect of the rebuttal testimony was to show arrest for crimes independent of that for which he was on trial, which error was, of course, not cured by the erroneous instruction of the trial judge.

In *Gold v. United States*, supra, also a narcotic case, the conviction rested entirely on the testimony of an informer and two accomplices who had pleaded guilty. The Appellate Court, taking note of the weakness of such testimony, reversed the conviction on the ground that the prosecution had "trapped" the trial Court into admitting incompetent evidence. In this connection the Appellate Court said, at page 186:

"The doctrine of completing proof has no application. We regard the prosecuting attorney's effort to bring in the story of what the taxi driver said to Higgins as highly improper. He must have known what Higgins would say, and he must have realized that it was incompetent, or he would have attempted to bring it out on the direct examination of Higgins. Bringing it out on cross-examination trapped the court into admitting incompetent testimony, which he would at once have recognized as incompetent, had the question been asked on direct. We cannot sanction such practice; nor can we, on the facts of this case, feel confident that the error had no effect upon the jury's verdict."

In *United States v. Dressler*, supra, the defendant was tried and convicted of kidnapping, and sentenced to be electrocuted. In this case the Appellate Court stated that the only serious question presented for its consideration arose out of the erroneous admission in evidence of two cards which carried the fingerprints of the defendant. These exhibits were identified and offered solely as fingerprints and were admitted in evidence as fingerprints. When they were received in

evidence, neither the prosecution nor the defendant's counsel was aware that on the reverse side of each card was a criminal record of the defendant. In concluding that the conviction should be reversed, the Appellate Court said, in part, as follows:

“The net result of the jury's having access to the criminal history of defendant was that the jury was informed that the defendant had been convicted of the crime of robbery and had been sentenced to imprisonment for a term of ten years; that he had been arrested on the charge of violating the Dyer Act, 18 U.S.C.A. § 408; that he had been arrested on the charge of rape and on some other charge designated as ‘Unlawful F. to A. P. in St. of Okla.’ The jury also learned that there was a criminal record on file in the U. S. Bureau of Investigation, Department of Justice. The foregoing information was before the jury during their deliberations in the jury room without any instruction or direction by the court, and we are not free to conjecture that the members of the jury were conscious of any limitations or restrictions upon their use of it.

It is not questioned by the government that the information conveyed to the jury under the heading ‘Criminal History’ on each card was inadmissible and should not have been permitted to go to the jury. The Government does contend, however, that the cause of defendant was not prejudiced by the consideration of such information by the jury.” (Page 977.)

* * * * *

“If the only question before the jury had been that of guilt or innocence, we believe that the defendant's confession and his own testimony on the witness stand were sufficient to render harm-

less the consideration of the information furnished by the 'criminal history.' The confession and testimony of defendant constituted a detailed statement of what amounted to a plea of guilty to the charge of kidnaping. Obviously it would be an irrational conclusion to assume that the jury was influenced to any extent in finding the defendant guilty by the 'criminal history' when the defendant had frankly admitted the commission of all the acts which constituted guilt under the kidnaping statute. But different considerations are involved in appraising the effect of the 'criminal history' upon the minds of the jurors while they were engaged in deciding whether the death penalty should be recommended. The decision of that question called for an exercise of discretion and an evaluation of any mitigating circumstances. *It was the duty of the jury to determine whether the defendant in view of all the circumstances surrounding the commission of the crime, merited the death penalty.* In respect to the issue of guilt or innocence of the defendant the jury was bound by strict law to return a verdict of guilty if it found that the defendant had committed certain acts; while in exercising its privilege of recommending imposition of the death penalty the jury was not bound by strict rules of law but acted on its appraisal of the character of the conduct of the defendant as evidenced by his acts which were related to the commission of the crime with which he was charged." (Italics supplied.) (Pages 979, 980.)

From this language it may be reasonably concluded that if this were not a case involving the death penalty, the conviction would not have been reversed.

In *Middleton v. United States*, supra, the Appellate Court reiterated the rule that where there has been *substantial* error it can not be cured by the Court's instruction to the jury to disregard it, although this holding seems to conflict with the contrary intimation in the *Dressler* case. In the *Middleton* case, the defendant, who was convicted of conspiracy with other defendants to transport and possess intoxicating liquor, on being asked whether he had ever been convicted of certain misdemeanors, answered, over objection, that he had been, in the United States Court, on three occasions of selling liquor, and further admitted that he had been fined for such violations. Although the Court afterward, on its own motion, withdrew this testimony and instructed the jury to disregard it, the Appellate Court held, as above indicated, that the cautionary instructions of the Court could not cure the error arising out of the violation of the settled rule that such questions must be limited to convictions for felony, infamous crimes, or crimes involving moral turpitude. It should be pointed out, however, that the decision in this case was rendered prior to the time that the Supreme Court, in *Berger v. United States*, supra, at page 82, put an end to the rule, formerly existing, that "error being shown, prejudice must be presumed", and firmly established "the more reasonable rule that if, upon examination of the entire record, substantial prejudice does not appear, the error must be disregarded as harmless".

In *Sang Soon Sur v. United States*, supra, citing *Berger v. United States*, supra, this Honorable Court,

in reversing a conviction for income tax evasion where there was read into the evidence, over objection, a statement given by the defendant to an Internal Revenue Agent that he had been arrested several times and also convicted of a narcotic violation, indicated that to warrant reversal the error must be glaring and obviously harmful. In this decision, while stating that evidence of the character complained of had been held to be of such a prejudicial character that cautionary instruction on the part of the trial Court to disregard it could not cure its harmful effect, this Honorable Court, however, did not say that had such a cautionary instruction been given in this case, its decision would have been the same.

In *Templeton v. United States*, supra, a liquor law violation case, the defendant and his alibi witnesses, over objection, in response to the question of the prosecutor whether they were related to a notorious bootlegger, answered in the affirmative. In properly reversing the conviction the Appellate Court stated, at page 708:

“* * *. Without any foundation in fact for showing such a connection, this testimony tended to connect appellant, who was charged with a violation of the liquor laws, with Carter, a reputed criminal of the same type. Had it not been admitted the defense of an alibi would have had a basis sufficient to justify the jury in returning a verdict of not guilty.”

It is highly significant that in the cases cited by appellant, with exception of the *Middleton* case, the trial

Court either failed to give the jury the correct instruction, as in the *Smith* case, or to clarify a multitude of legal complexities, as in the *Kotteakos* case, or to give any instructions whatsoever in the remaining cases. That a proper cautionary instruction, in the absence of exceptional circumstances, cures error, is supported by the overwhelming weight of authority. This principle was clearly stated in *Remus v. United States* (C.C.A. 6), 291 Fed. 501, 510, certiorari denied 263 U.S. 717:

“The general rule is that where evidence erroneously admitted is withdrawn from the consideration of the jury by the direction of the presiding judge, such direction cures any error which may have been committed by its introduction. *Throckmorton v. Holt*, 180 U.S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663; *Hopt v. Utah*, supra; *Pennsylvania Co. v. Roy*, 102 U.S. 452, 26 L. Ed. 141. It is also true that in exceptional instances the withdrawal of evidence improperly admitted does not cure the error, but this does not appear to be such a case.”

To the same effect, see the decision of this Honorable Court in *Metzler v. United States*, 64 F. (2d) 203, 207, 208.

In *Looker v. United States*, (C.C.A. 2), 240 Fed. 933, 935, the Court, after also citing, among others, the cases of *Hopt v. Utah*, 120 U.S. 430, and *Throckmorton v. Holt*, 180 U.S. 552, made this compelling pronouncement:

“It is only when evidence unlawfully admitted is of such apparent weight, and so prejudicial in

effect, that the judicial warning against it seems light and unavailing by comparison, that the error remains uncured.”

In *United States v. Maggio* (C.C.A. 3), 126 F. (2d) 155, 159, certiorari denied 316 U.S. 686, a liquor case in which incompetent evidence was introduced, over objection, and later stricken and the jury told to disregard it, the Appellate Court, in interpreting the “harmless error” statute, said:

“A witness testified, over objection, that Ciccone rented a house in Asbury Park where he intended to install a still. After it became clear that the testimony as to the rental of the Asbury Park house would not be connected by the government with any of the charges in the indictment the trial court ordered the testimony stricken and instructed the jury to disregard it. * * * We think that in view of the action of the trial court the effect of the wrongful admission of this evidence was not such as to substantially affect the rights of the defendant Ciccone. *Beyer v. United States, supra*, and *Thompson v. United States, supra*, relied upon by the defendants are not apposite, however, *for in neither was an effort made to eradicate the effects of the inadmissible testimony.*” (Italics supplied.)

In *United States v. Zeoli* (C.C.A. 3), 170 F. (2d) 358, 360, wherein the defendant sought reversal “upon the ground that an experienced Government witness presented hearsay testimony after having been cautioned by the Court”, the Appellate Court refused such reversal on the ground that the “statements of the witness definitely were not of a nature to create

an *ineradicable prejudice* in the minds of the jury''. (Italics supplied.)

In *Jarabo v. United States* (C.C.A. 1), 158 F. (2d) 509, 515, a case in which the defendant was convicted of a violation of the White Slave Traffic Act, the Appellate Court, in refusing to reverse the conviction, indicated in the following language the curative effect of the proper cautionary instructions:

"His principal criticisms of the prosecuting attorney are that on one occasion he referred to a woman who had been photographed by the appellant as one of his 'victims', and that in cross-examining one of the appellant's medical experts he undertook to show that the expert had testified in court a great many times and on several occasions his testimony had not been believed. Upon objection the prosecuting attorney immediately substituted 'persons or subjects' for 'victims' and as soon as the court discerned the trend of the cross-examination of the medical expert it promptly prevented its continuance. Certainly what was said and done by the prosecuting attorney was not so serious that we can conclude that the corrective actions taken were futile. On the contrary it seems to us that such prejudice as the conduct of the prosecuting attorney may have engendered was completely cured.

The appellant also complains that certain witnesses interjected irrelevant and prejudicial comments into their answers. Typical examples are the remarks of the woman who testified in support of the charges laid in count one that 'I thought he was a real good boy but never thought that he was the kind he is', and 'He has ruined my life.' Since the court below repeatedly ad-

monished the witness not to make such remarks, and since at the time they were made instructed the jury to disregard them we think any prejudice they may have aroused was adequately eradicated. At least we can not say in the light of the entire record that the remarks were so highly prejudicial that the measures taken could not have been effective so that as a result the appellant should be given a new trial.

It will suffice to say in summary that a careful consideration of all the instances of alleged unfairness at the trial viewed both individually as isolated events and collectively for their cumulative effect, convinces us that guarding against the '*Magnification on appeal of instances which were of little importance in their setting*' (*Glasser v. United States*, 315 U.S. 60, 83, 62 S. Ct. 457, 471, 86 L. Ed. 680, and cases cited) we cannot conclude that the appellant has been denied a fair and impartial trial." (Italics supplied.)

See also,

Holsman v. United States (C.C.A. 9), 248 Fed.

193, 196, certiorari denied 249 U.S. 600;

Ginsberg v. United States (C.C.A. 5), 96 F.

(2d) 433, 436;

United States v. Ginsburg (C.C.A. 7), 96 F.

(2d) 882, 885;

Utley v. United States (C.C.A. 9), 115 F. (2d)

117, 119;

Hilliard v. United States (C.C.A. 4), 121 F.

(2d) 992, 998, certiorari denied 314 U.S. 627;

United States v. Amorosa (C.C.A. 3), 167 F.

(2d) 596, 598.

To summarize: The remarks of the fingerprint expert were not error. If assuming *arguendo*, they were, the effect upon the jury could only be slight, and the error was cured by the cautionary instructions of the trial Court. To paraphrase the words of the Supreme Court, in *Glasser v. United States*, 315 U.S. 60, 83, as cited in *Jarabo v. United States*, *supra*, the appellant herein has magnified on appeal instances which were of little importance in their setting.

III.

THE ALLEGED FAILURE TO PROVE VENUE.

What is venue?

Rule 18 of the Federal Rules of Criminal Procedure provides the answer:

“Except *as otherwise permitted by statute* or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.” (Italics supplied.)

The first time that counsel for the appellant specifically urged the proposition that there was a total failure of proof of venue to establish jurisdiction of the United States District Court for the Northern District of California was in his amended statement of points on appeal. (Tr. 426.) Counsel suggests that the proper venue and place of trial for the substantive offenses of which Stoppelli was convicted was the

Southern District of New York, and not the Northern District of California.

Appellee wonders whether this as a tacit admission by appellant that he committed the violations in the Southern District of New York. Appellant argues that in order to sustain his conviction the Court would necessarily have to infer that he had possession of the envelope with the heroin in the Northern District of California, and that it would also have to infer that there was heroin in the envelope, which, to use his exact words, "would be nothing but an inference based upon an inference". Counsel for appellant apparently has confused the term "inference based upon an inference" for, in effect, he is saying that the prosecution is not permitted to establish separate elements of the crime by circumstantial evidence, which position is, of course, untenable. Appellee does not, as appellant says, have to presuppose that appellant had possession of the heroin, because the evidence is conclusive in this regard. Furthermore, it should be repeated that a jury has a right to strongly believe that where a package with a large amount of narcotics is found in California, and Stoppelli's fingerprint is on one of the envelopes containing the narcotics, either Stoppelli, or one of his agents, was in California, and if his agent was in California, then he is, of course, bound by the acts of his agent. The only possible explanation that could be given is that the narcotics were stolen from Stoppelli. This might relieve him of prosecution for selling, dispensing or distributing narcotics under the Harrison Act, but not of

prosecution under the Jones-Miller Act, and if it were conclusively shown that the narcotics were stolen from Stoppelli when he was in New York, then he could be prosecuted in New York, but no such proof was offered, and for an obvious reason. Stoppelli does not show such proof because he wishes to relieve himself of criminal responsibility in New York, as well as in California. Appellant, having failed to produce evidence that the heroin was stolen from him in New York, or that he was not in California at the time the heroin was passed to the undercover operative, or within a four-week period prior thereto, appellee, in view of the evidence herein and in reliance on the presumptions arising out of possession, asserts that venue has been clearly established. This question was considered in *Mullaney v. United States*, 82 F. (2d) 638, in which case this Honorable Court, at page 641, clearly stated the prevailing rule which is binding on the appellant herein:

“This Court expressly held, in *Casey v. United States*, 20 F. (2d) 752, that the presumption contained in the statute extended also to venue. This was proved on appeal *Id.*, 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632.”

Appellant has mentioned this case and this quotation on page 25 of his opening brief but he argues that this Honorable Court did not mean to say what it actually said. In effect, he argues that this Court wrongfully interpreted the decision in *Casey v. United States* (C.C.A. 9), 20 F. (2d) 752, as approved on appeal by the Supreme Court in 276 U.S. 413. It goes without saying that counsel for the ap-

pellant has erroneously analyzed these decisions, decisions which have never been overruled, and which, to say the least, state the rule of law binding on the Courts in the Ninth Circuit. Furthermore, the United States Court of Appeals for the Fifth Circuit has asserted the same rule in *Acuna v. United States*, 74 F. (2d) 359, 360, a decision referred to by this Honorable Court in the *Mullaney* case. In the *Acuna* case, the Appellate Court, in affirming a conviction for illegal purchase of narcotics under the Harrison Act wherein there was no evidence of the place of the alleged purchase, after holding that the conviction must rest on the defendant's possession of the unstamped bottle containing 12 grains of morphine, aided by the presumption set forth in the statute, said as follows:

“* * *. The statutory presumption is not arbitrary or unreasonable or without any logical basis. Persons ordinarily do not and cannot make morphine, but get it most often by buying it. If it is found in an unstamped container, there is some probability that it was acquired unstamped. The possessor best knows how and where he got it, and the statute affords him full opportunity to show the truth. The prima facie presumption indeed is only a means of putting the burden of proof on him as to matters within his peculiar knowledge, and there is nothing new or unreasonable in doing that. *But it is specially urged that venue cannot be presumed, and it was so held at first under this statute. The Supreme Court in Casey v. United States*, 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632, referred to these decisions and disapproved them, affirming the hold-

ing in (C.C.A.) 20 F. (2d) 752, that venue could be so established and that Congress must have intended the presumption to cover the place of purchase as well as the fact of purchase, since there was the same difficulty of proof of each to the prosecution, and the same facility to the accused of showing the truth if the presumption was in any case incorrect.” (Italics supplied.)

The appellant, in attempting to minimize the terrific impact which the Casey and Mullaney, as well as the Acuna, decisions have had upon his fruitless efforts to extricate himself from the predicament in which he deservedly finds himself, is able only to cite the following three cases:

- Brightman v. United States*, 8th Cir., 7 F. (2d) 532;
- Vernon v. United States*, 146 Fed. 121;
- United States v. Jones*, 7th Cir., 174 F. (2d) 747, 748, 749.

These cases, as will be seen, are either clearly distinguishable from our case at bar, or are in conflict with the prevailing rule.

In *Brightman v. United States*, supra, in reversing a conviction for unlawful purchase of narcotics in violation of the Harrison Narcotic Act, where there was no evidence as to where the narcotics had been purchased, the Appellate Court held that there was no “rational connection between the fact of possession of morphine in the Western District of Oklahoma and the fact of the purchase of it in that same district as to make the former prima facie evidence

of the latter''. In *Casey v. United States*, supra, the defendant relied on the decision in the *Brightman* case, but without success, for, as has already been pointed out in the *Acuna* case, the Supreme Court disapproved this earlier decision. In the *Brightman* case, it was also suggested that the presumption of venue arising out of possession could not be constitutionally upheld, citing *Vernon v. United States*, 141 Fed. 121, from which latter case appellant also quoted in his opening brief, at page 27. This Honorable Court, however, in the *Mullaney* case, also considered this constitutional objection and found it to be without merit, citing, in support thereof, the *Casey* case, as well as its decision in *Hooper v. United States*, 16 F. (2d) 868, and cases cited therein.

The case of *United States v. Jones*, supra, likewise gives the appellant little comfort, for in this case there was no evidence to show that either the defendant or the narcotics was ever found in the district wherein the offense was laid. It is interesting to note that the Appellate Court, in the *Jones* case, cited as authority, among others, the *Brightman* and *Vernon* cases, supra, which decisions, as above indicated, no longer recite the prevailing rule. The *Jones* case also holds that a motion for a judgment of acquittal preserves the objection as to lack of venue, even though the specific question was not urged upon the lower Court during the course of the trial. That there is some authority to the contrary may be seen by reference to the case of *Fleitas v. United States* (C.C.A.-5), 40 F. (2d) 636, wherein it is intimated by the Ap-

pellate Court, citing, among others, the case of *Casey v. United States*, supra, that in asking for a judgment of acquittal the attention of the Court should be specifically directed to the alleged insufficiency of proof of venue. But, regardless of whether or not a motion for a judgment of acquittal preserves the question of the alleged failure to prove venue, where it is not specifically urged, this fact could not possibly affect the result in our case at bar. Appellant, in his opening brief, has quoted the following language, in the case of *United States v. Jones*, but appears to have completely ignored its import:

“Venue does not have to be proved by direct and positive evidence. If, upon the whole evidence it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient.”

Perhaps the appellant was also unaware of the significance of these additional words in the decision of the Appellate Court, which immediately follow the language hereinabove set out, but which appellant has omitted in his opening brief:

“However, venue will not be inferred from proof that the acts constituting the crime were committed upon certain streets, where the city within which the streets are located is not identified. The court will not take judicial notice that the streets referred to in evidence are in any certain town.”

In this connection attention is also directed to another decision of the United States Court of Appeals

for the Seventh Circuit, in *United States v. Karavias*, 170 F. (2d) 968, 970, wherein it was declared:

“The general rule governing proof of venue is that there need be no positive testimony that the violation occurred at a specific place, but that it is sufficient if it can be concluded from the evidence as a whole that the act was committed at the place alleged in the indictment. *George v. United States*, 1942, 75 U.S. App. D.C. 197, 125 F. (2d) 559; *People v. Allegretti*, 1920, 291 Ill. 364, 126 N.E. 158; *People v. Reynolds*, 1944, 322 Ill. App. 300, 54 N.E. (2d) 850, and cases cited. And, as stated by this Court in *Wallace v. United States*, 7 Cir., 1917, 243 F. 300, 306, ‘venue, like any other fact, may be shown by evidence, direct, indirect or circumstantial’.”

That there has been a confusion on the part of counsel for defendants as to the definition of venue may be seen by reference to this language in *Cooper v. United States* (C.C.A.-5), 91 F. (2d) 195, 198, 199, cited with approval in *Palmero v. United States* (C.C.A.-1), 112 F. (2d) 922, at page 926:

“ ‘The constitutional provisions as to venue in Article 3, §2, and in the Sixth Amendment, require trial where “the crime shall have been committed”, not where the accused was when the crime was committed.’ ”

The presumption of venue arising out of possession under the Harrison Narcotic Act and the Jones-Miller Act, which, as above indicated, has been expressly approved in the *Mullaney*, *Casey* and *Acuna* cases, and authorities cited therein, finds sanction in Rule

18 of the Federal Rules of Criminal Procedure, *supra*, which defines venue. Rule 18 recites that, where permitted by statute, a prosecution may be had in a district other than where the offense was committed. Title 18 U.S.C.A. 2, *supra*, is such a statute, providing, in effect, that one who aids in the commission of an offense, or causes the commission of an offense, regardless of where he may be at the time the offense is actually committed, even if outside the territorial limits of the United States, is held accountable in the place where the crime is laid. In *Ford v. United States*, 273 U.S. 593, 623, the Supreme Court asserted the rule as expressed by John Bassett Moore, then Judge of the Permanent Court of International Justice, while he was Assistant Secretary in the State Department:

“The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.”

The Appellate Court, in *Palmero v. United States*, *supra*, at pages 924, 925 referring to the case of *Ford v. United States*, said:

“It is clear, then, that there was an ‘importation’ or ‘bringing in’ of the opium when the S. S. Exeter entered the territorial waters of the United States, and a concealment of the same.

Under the statute importation and bringing in of the opium and concealment of the same thereafter are distinct violations. Appellants aided and abetted the commission of both of these offenses. *Krench v. United States*, 6 Cir., 42 F. (2d) 354. While it is true that the appellants were outside the jurisdiction of the trial Court during the time the opium was imported or brought in and concealed, they may be convicted of aiding and abetting if the court has jurisdiction of them at the time of the trial."

In passing judgment on our case at bar it must be ever kept in mind that heroin is a proscribed drug (Tr. 37), finding its only outlet, with rare exception, in the illicit market. There is a clear distinction which must necessarily be drawn between those articles which are inherently evil and those articles which possibly may have legitimate use. In *Direct Sales Co. v. United States*, 319 U.S. 703, 710, the Supreme Court, in commenting on this distinction, pointedly said:

"* * *. The difference is like that between toy pistols or hunting-rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

Now, it is true that there are facts that have come out during the course of the trial, and if the Court finds this is too broad an allegation, I would now request the right to amend to make the pleadings conform to the proof as having been presented to the Court.

The Court: Your whole theory is based on a proposition of law which I haven't yet examined, but I gather from your remarks during the trial that irrespective of Young Brothers and the authority it may or may not have granted to its tug captain or allowed the tug captain to display, even though unauthorized, that you, in point of law, believe Young Brothers can be eliminated from the picture entirely, as they are not in the picture you drew in your pleadings, and we look solely to the barge.

Mr. Quinn: Yes, sir.

The Court: Or the tug.

Mr. Quinn: Yes, sir.

The Court: Whereas Mr. Collins, if I understand his position correctly, undertakes the defense by running his line in such a way that he is trying, perhaps has successfully shown that this was wholly unauthorized and that Young [264] Brothers is not liable; but he doesn't seem to me to get to the point of meeting you on your tug issue.

Mr. Quinn: I might point out that Mr. Collins would be entirely correct, if we had brought a suit in personam, that there is no doubt, if it were unauthorized, we would be barred. In fact this is a suit in rem.

True, Young Brothers came is as a claimant, but the liability tried is the liability of the Kolo.

The leading case on that is *The China*, which is an old case; but you will find the admiralty cases are largely old ones. *The China*, 7 Wall 53; 17 Law. Ed. 67. I am sorry, your Honor, 1868. And that was the case where the American authorities first split from the English authorities on this question; and that was the case of compulsory pilotage where the vessel was required by law to take a pilot and had no choice, could not direct his actions; the pilot was negligent, and the question before the Court was: Could the vessel be held liable under those circumstances? Held, so long as the person is in lawful possession of the vessel, he may render the vessel liable.

There is an article in 19 Harv. L. R. 445, *Respondent Superior in Admiralty*,—I take it that is exactly what Mr. Collins is relying on, that there can be no respondent superior in this case.—which is quoted in *Robinson on Admiralty*, page 365, that “liability in rem has no connection with the law of [265] master and servant, or with the maxim respondent superior.”

It has then been carried that a charterer, if the Court please, having no authority whatsoever from the owner to do anything except under contract, handling his own operations, which might be one single trip or voyage from Honolulu to Hilo to carry certain goods and back and turn the vessel over—en route the captain selected by the charterer

in California, with no one in the immediate vicinity; near the body was a gun, but not close enough for the deceased to have shot himself; on removing the bullet from the body of the dead man a ballistic check established that it was fired from the nearby gun; thereafter it was determined that the gun, and the fingerprint on the gun, belonged to John Doe, who lived in New York. Assuming that no evidence was introduced by the prosecution to show that John Doe was ever in California, or that he ever had any connection directly or indirectly with the deceased, and assuming further, that John Doe offered no testimony in his own behalf, would not the fact that it was his gun which took the life of the deceased be a sufficiently strong circumstance from which the jury could reasonably infer that he committed the homicide?

A situation analogous to the example just mentioned may be found in the case of *People v. Frank Jones* (Sup. Ct. App. Div. N.Y.), 12 N.Y.S. (2d) 635; leave to appeal denied 281 N.Y. 887; 22 N.E. 767. The factual situation, as stated by the Appellate Court, at page 636, is as follows:

“On the night of October 21, 1937, the business house of the Parish Oil Company of Parish, Oswego County, New York, was broken into, the safe was blown and one dollar in United States currency was taken from the safe. The fact that a burglary, with all the concomitant circumstances of such a crime, had been committed was self evident. The only clue to the perpetrator of the crime was a fingerprint left upon the door of the safe. * * *

The people's testimony was purely circumstantial. It consisted of the fact that the place had been broken into, the safe had been blown and looted of one dollar in United States currency and that a fingerprint had been left upon the door of the safe. To connect the defendant with the fingerprint left upon the safe the state called two fingerprint experts, who testified that they had compared the known fingerprints of the accused with the fingerprint left upon the safe and they gave it as their opinion that the fingerprint on the safe was identical with the known fingerprint of the middle finger of the accused's left hand. The people also established that the prisoner did not have lawful access to and had not been at the place burglarized under such circumstances that the presence of the fingerprint upon the door of the safe could be accounted for upon any hypothesis of his innocence. No other testimony tending to connect the defendant with the commission of the crime was given. The defendant did not testify in his own behalf nor did he attempt to prove an alibi or to show that the fingerprint on the safe was not his, or, if it was his, to account for its presence upon the safe. The case was submitted to the jury in a fair and comprehensive charge to which no exception was taken. The court left it to the jury to say whether or not the fingerprint on the safe was that of the defendant. The jury found that it was and returned a verdict of guilty as charged in the indictment."

In affirming defendant's conviction for burglary and larceny, the Appellate Court concluded, at page 640:

“The fingerprints shown on the enlarged prints are clear and distinct and, with the aid of the expert testimony, prove beyond a reasonable doubt that the fingerprint found on the safe was made by the middle finger of the defendant’s left hand. Expert testimony in aid of these prints, was proper. *Marion v. B. G. Coon Construction Co.*, 216 N.Y. 178, 182, 110 N.E. 444. In the absence of evidence showing either that the fingerprint found upon the safe was not that of the defendant or, if it was, that it was placed there innocently, the jury were justified in finding that the defendant was the guilty party and that he committed the crimes charged beyond a reasonable doubt. The weight to be given to the testimony relative to the fingerprints was for the jury and not for the court. *People v. Roach*, *supra*, 215 N.Y. page 605, 109 N.E. 618.”

In its opinion, the Appellate Court likewise cited, with approval, the case of *Parker v. The King*, *supra*, and in connection with this case said as follows:

“We have for review the interesting question whether, when the only evidence of identity against an accused person depends upon the resemblance between fingerprints, such evidence is sufficient to support a conviction. This precise question, so far as we can discover, has never been passed upon by the courts of this state but it was before the High Court of Australia in 1912 on an application for leave to appeal to that court from a judgment of conviction rendered in the Supreme Court of Victoria in *Parker v. The King*, 14 C.L.R. Austr. 681, *British Ruling Cases* Vol. 3 page 68. The defendant was tried and con-

victed on a charge of breaking into a shop and stealing therefrom the contents of a safe. *The only evidence against him depended upon a comparison of one of several fingerprints found on a bottle which was in the shop with a print of the middle finger of Parker's left hand taken while he was in jail.* The court in denying the application said at page 69:

'Signatures have been accepted as evidence of identity as long as they have been used. The fact of the individuality of the corrugations of the skin on the fingers of the human hand is now so generally recognized as to require very little, if any, evidence of it, although it seems to be still the practice to offer some expert evidence on the point. *A fingerprint is therefore in reality an unforgeable signature. That is now recognized in a large part of the world, and in some parts has, I think, been recognized for many centuries.* It is certainly now generally recognized in England and other parts of the English dominions. If that is so, there is in this case evidence that the prisoner's signature was found in the place which was broken into, and was found under such circumstances that it could only have been impressed at the time when the crime was committed. It is impossible under those circumstances to say there was no evidence to go to the jury.'''
(Italics supplied.)

Here are instances of convictions on the basis of a single fingerprint found at the scene of the crime, convictions secured unaided, as is appellee herein, by

the presumption of guilt, including venue, arising out of unlawful possession of narcotics.

In drawing this argument to a close, appellee particularly calls the attention of this Honorable Court to the case of *United States v. Perillo, et al.* (CCA-2), 164 F. (2d) 645, a case, incidentally, in which Stoppelli, the appellant in our case at bar, was indicted, but not tried, and in which a co-defendant, Joseph Venetucci, sought reversal of his conviction of violating the Jones-Miller Act, on the ground that the only evidence to connect him with the unlawful enterprise was a single fingerprint of his found on one of two packages of heroin contained in a paper bag. In this case, the codefendant Venetucci, as did the appellant in our case at bar, complained, in the language of the over-worked phrase, that he was convicted "on an inference based on an inference". The Appellate Court brushed this contention aside by saying:

"We find no occasion to discuss the abstract proposition as to when an inference is not a permissible one because another inference removes it too far from established fact."

The Court did find that there was some additional evidence, namely, the testimony of an informer, which implicated the appealing defendant, and accordingly did not pass on the proposition whether or not the fingerprint alone was sufficient to sustain the conviction. A careful reading of this opinion supports the intimation, however, that the Appellate Court would

have ruled in the Government's favor on the basis of the fingerprint evidence alone.

Finally, the attention of this Honorable Court is called to the fact that approximately eleven ounces of a deadly drug, heroin, was sold to an undercover agent of the United States, in Oakland, California, for approximately \$10,000.00. All who had anything to do with the transaction, including Stoppelli, are equally guilty. Only Stoppelli has appealed. This, of course, is his right, and no one challenges that right, but he cannot escape his liability by vigorously protesting, as he does, without basis in law, logic or fact, that the evidence is insufficient to support his conviction, that the fingerprint expert committed prejudicial error, and that the presumptions of guilt, including venue, arising out of unlawful possession of narcotics somehow cannot possibly be made to apply to him.

CONCLUSION.

The Court below, out of what appellee respectfully suggests was an overabundance of caution, granted the appellant herein his motion for a new trial on the conspiracy count of the indictment, basing its ruling primarily on the ground that the presumptions of guilt arising out of unlawful possession of narcotics are not applicable to a charge of conspiracy to violate the Narcotic Statutes. (Tr. 417.)

Appellee respectfully submits that it would be a grave miscarriage of justice to free the appellant, who,

acting behind the scenes, sent others forth to do his infamous work. The reversal of appellant's conviction, it is also respectfully submitted, would be an invitation to men like him to continue to use others to earn wealth for themselves without running the risk of having to pay the price of criminal responsibility for their traffic in human misery. The Congress, acting for the people, by inserting in the law the presumptions of guilt arising out of unlawful possession of narcotics, showed that no such result was intended. This Honorable Court, by its decisions, has lent strength to the determination of our lawmakers to make it extremely costly to one's liberty to in any way become illegally involved in the narcotic traffic, particularly when it is for profit.

In view of the foregoing, it is respectfully urged that the appellant's conviction on the first and second counts of the indictment should be affirmed.

Dated, San Francisco, California,

February 6, 1950.

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Attorneys for Appellee.

No. 12,373

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN STOPPELLI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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PAUL P. O'BRIEN,

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THE KEY TO THE ERROR IN THE PROSECUTION'S REPLY BRIEF IS THE ERRONEOUS BELIEF THAT THERE IS NO PRESUMPTION OF INNOCENCE IN NARCOTIC CASES BUT ONLY A PRESUMPTION OF GUILT.

The prosecution's reasoning is founded upon a fundamental error when it says at page 32 of its brief:

*"The Congress, acting for the people, by inserting in the law the presumption of guilt arising out of unlawful possession of narcotics * * *"*

The provisions of the law do no more than create a *prima facie* case when there is legal and actual proof of possession of narcotics and make it proof of unlawful possession. There is nothing in these laws which destroys the presumption of innocence.

This *prima facie* evidence rule does not mean that every possible thing or fact connected with a narcotic case is to be interpreted only as consistent with guilt. If there are facts which can reasonably be interpreted in favor of innocence, such interpretation must be given.

Example: The prosecution's reasoning is that because eleven other envelopes are of the same type it must be presumed that Stoppelli handled the other eleven also. There is no evidence that the envelopes were of a peculiar kind or type. It is apparent from looking at the envelopes that they are of a kind that can be bought in San Diego, California, New York City, Tampa, Florida or Seattle, Washington and in numerous stores in each location. That fact is therefore just as logically consistent with Stoppelli's innocence of handling the eleven other envelopes, as with guilt. The court must reach those conclusions of fact which are logically consistent with innocence.

The prosecution in every instance reasons that all facts are to be interpreted only as proving guilt.

Another example of the prosecution's reasoning is its insistence that if an envelope with Stoppelli's fingerprint is found in Oakland, the court must find that Stoppelli was in Oakland. The presumption of innocence compels the conclusion that he was not in Oakland until evidence to the contrary appears. The prosecution insists, however, that this court must presume guilt and reach the conclusion that he was in Oakland from the fact the envelope was found there, in possession of others, unknown to him.

Regardless of the effect of the *prima facie* rule, it has its limitations. Though affirmed on the *facts*, Mr. Justice McReynolds, seeing the danger in the *prima facie* rule, said in *Casey v. U. S.*, 276 U.S. 413 (72 L. Ed. 632) at page 635:

“I accept the views stated by Mr. Justice Butler * * *. But I go further.

The provision under which we are told that one may be presumed unlawfully to have purchased an unstamped package of morphine within the district where he is found in possession of it conflicts with those constitutional guarantees heretofore supposed to protect all against arbitrary conviction and punishment. The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary.

Once the thumbscrew, and the following confession, made conviction easy; but that method was crude and, I suppose, now would be declared unlawful upon some ground. Hereafter, presumption is to lighten the burden of the prosecutor.

The victim will be spared the trouble of confessing, and will go to his cell without mutilation or disquieting outcry.”

Question: How far can this rule be stretched without evidentiary support? Justice McReynolds saw very well that the *prima facie* rule was but one step in the effort by prosecutors, to do away with all the constitutional rights of a defendant.

In the prosecution's brief we see the ultimate and final step feared by Mr. Justice McReynolds, i.e., that there is a presumption of guilt and no presumption of innocence.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILT AGAINST THE DEFENDANT AND APPELLANT ON THE FIRST AND SECOND COUNTS OF THE INDICTMENT.

- (a) The evidence, even as interpreted by the prosecution, is insufficient to support a violation of the Harrison Narcotic Act.

The charge against Stoppelli under the Harrison Narcotic Act is that he sold, dispensed and distributed *in Oakland, California* 12 envelopes of heroin. The envelopes were *found* in the possession of four men in Oakland; Stoppelli, as far as the record shows, was in New York.

The prosecution, after indulging in many conclusions of fact and inferences based upon a presumption of guilt, winds up with the final conclusion that Stoppelli *at one time had the narcotics in his possession*. It will be noticed that the *prima facie* evidence provision of the Harrison Narcotic Act is as follows:

“The absence of appropriate tax paid stamps for any of the aforesaid drugs shall be *prima facie* evidence of a violation of this sub-section *by the person in whose possession same may be found*;
* * *”

The requirement of the Harrison Act is that the narcotics be found in the possession of the defendant. The contrary appears, i.e., the narcotics were in the possession of other parties who were not connected with Stoppelli. The Jones-Miller Act uses the words in regard to possession:

“To have or to have had possession of a narcotic drug, * * *”

It is plain from the difference in the wording of these laws that the Harrison Act requires that the narcotics be found in the possession of the defendant, while under the Jones-Miller Act it can be shown that he had possession sometime in the past.

The prosecution produced positive evidence showing the narcotics were found in the possession of parties not connected with Stoppelli. They did not prove or even infer that they were discovered or found in his possession. On the prosecution's own statement there is no evidence showing that Stoppelli violated the Harrison Narcotic Act.

(b) The evidence was insufficient to show a violation of the Jones-Miller Act.

The prosecution (page 8 of its brief) insists that because all 12 envelopes contained 80% heroin and 20% reducing sugar this proves that Stoppelli possessed all 12 at some time and place, unspecified. There is no evidence that Stoppelli reduced the heroin. Likewise, it cannot be presumed that only Stoppelli and no other person in the whole world would mix heroin with reducing sugar or that he was the only person who mixed them in those proportions. No conclusion of Stoppelli's guilt can be reached from this fact. The evidence of the prosecution witness LaFevor (Tr. pp. 205-7) shows that defendant Ingoglia did reduce heroin with milk sugar, and that the witness purchased such milk sugar for Ingoglia.

The prosecution (Br. pp. 10, 15) argues that there was heroin in the one envelope when Stoppelli's fingerprint was made. It arrives at this by accepting, as

a proven fact, the conclusion of W. Harold Greene that there was a powdery substance in a container enclosed in the one envelope which showed Stoppelli's print. We answered this argument in our opening brief. (pp. 5-8.) We refer to it again to show the bias, prejudice and gross unfairness of W. Harold Greene. We also refer to it again to show Greene's calculated plan of misconduct when testifying.

The prosecution on page 8 of its brief argues that it is reasonable to assume that appellant dispensed or distributed the narcotics to "His (Stoppelli's) Agent". There is no evidence that Stoppelli ever knew or had contact with any of the other defendants. Why, we ask, is it not just as logical to reason that if Stoppelli sold or conveyed the narcotics, he did so to some person and with no knowledge of its future use or owners or destination, and that through devious handlings and sales, it reached the other co-defendants.

The conclusion of the witness Greene that there was heroin inside the containers in the envelopes rests only in the speculation and suspicion of the witness Greene. We again point out that many substances other than heroin could have brought about Greene's conclusion. The presumption of innocence is a guard-wall against such conclusions.

The reasoning of the prosecution is well illustrated by its attempt to distinguish between facts in the case of *Ching Wan v. U. S.*, 35 Fed. (2d) 665 and the facts of this case. In the *Ching Wan* case, the court expressly held that a person had to possess knowledge

of what was within a box before he could be held guilty of the possession of narcotics contained therein. But the prosecution contends here that in an envelope which is not transparent nor translucent and containing still another sealed cellophane envelope, Stoppelli must have known that there was heroin therein. The record here shows no more evidence of guilt nor knowledge of the contents of this envelope (if it were ever handled by Stoppelli) than was shown in the *Ching Wan* case.

The failure to prove Stoppelli's knowledge of the nature of the contents of the envelope is fatal.

The prosecution at pages 16 and 17 of its brief misstates the facts in *Camau v. U. S.*, 276 Fed. 120. The facts there were not, simply, that the defendant had keys to a trunk in which narcotics were hidden. The additional facts are that the defendant was the manager of a hotel, in the basement of which there were a number of trunks; the officers asked him whether he had the keys to any of the trunks and he denied that he had them; the officers searched him and he surrendered a bunch of keys. Three of the keys fitted three of the trunks in which narcotics were found. In the *Camau* case, the direct connection of the defendant with possession and control of the trunks and the keys was shown, together with his false answers as to his access to the trunks. A very different set of facts than that set forth by the prosecution.

On page 16 of their brief the prosecution argues that a period of four weeks is a "short time". W. Harold Greene testified that the fingerprint of Stop-

PELLI was up to four weeks old. Notwithstanding this, the prosecution contends that the narcotics were delivered to the undercover operator by a co-defendant of Stoppelli within "a short time" after Stoppelli's finger print was placed on one of the envelopes. We find no evidence to connect Stoppelli with this delivery, and this fingerprint up to four weeks old is not sufficient.

Finally, the prosecution seeks to sustain the verdict by sustaining the presumption that there was heroin in the envelope as against the presumption (of innocence) that there was not. Then upon this presumption another must be added, to-wit: that Stoppelli knew it was heroin.

The prosecution asks why the defense didn't put a fingerprint expert on the stand. The Government didn't prove a case against Stoppelli and it wasn't the burden of Stoppelli to prove himself innocent. Under this state of the evidence in this case, I felt it was unnecessary to offer any testimony. The record will show I so stated to the court at the trial.

**THE MISCONDUCT BY THE GOVERNMENT WITNESS
W. HAROLD GREENE.**

There is proof before this court that there was bias and prejudice in this case.

The jury in this case found Stoppelli guilty of conspiracy without sufficient evidence, in the opinion of the trial judge, and he granted a new trial. In fact,

there was not one iota of evidence to show a conspiracy or combination between Stoppelli and the other defendants. A clearer demonstration of the bias and the prejudice in the minds of this jury resulting from the misconduct of the prosecutor and Mr. Greene cannot be imagined. When a jury's verdict is against *a man upon no evidence, prejudice and bias are clearly shown.*

In approaching the misconduct of W. Harold Greene, we point out that in a narcotics case, it is impossible to obtain a completely unprejudiced jury. There has been so much said in magazines, the press, and on the radio over the years concerning the evils of narcotics that the very mention of the word creates revulsion and bias and prejudice in every person. In these circumstances a defendant has an up-hill battle every inch of the way and the least finger of suspicion pointed at the defendant is sufficient to produce a conviction.

It is daily experience in the courts that any statement or hint from a Government witness in a narcotics case is quickly seized upon by the average juror as a fact.

This Honorable Court should take judicial notice of the dangers to a defendant and to the improbability of securing a fair trial.

The prosecution argues that the jury here would not have caught the plain and direct meaning of what W. Harold Greene said. This is contrary to human experience. He used the clearest of language, which

coupled with his position was enough to prejudice any juror. No statement by a Government witness from which either suspicion or inference of Stoppelli's connection with the narcotics business could go unnoticed by a juror. To argue to the contrary is to be blind to the tendency of human nature.

Please notice in Mr. Greene's deliberate statements that he refers to:

“We have a National Book”

“Every District Supervisor in the County in the Narcotics Bureau has a National Book”

“Published by the Narcotics Bureau”
(Tr. p. 254.)

The jury would have to be completely simple and dumb not to have caught, immediately, the full import and meaning of these words.

We completely disagree (Res. Br. p. 19) that the trial judge drew no inference from these remarks. The very fact that the judge instructed the jury to disregard the answer is indicative that he, too, caught the clear meaning.

As to the remarks made by the trial judge (Tr. p. 303 and 305) and referred to by the prosecution on page 20 of its brief, we respectfully submit that the verdict shows that the reasoning of the lower court was unsound and hastily considered.

The prosecution (page 21) argues that when Mr. Greene used the phrase “men of experience of that type” these words meant nothing more than that Mr.

Stoppelli was skilled in the art of placing things in envelopes. This is a most ingenious explanation of Mr. Greene's misconduct. To presume that the jury placed the meaning upon the quoted words, as contended by the prosecution, would be to presume that the jurors were a naive and helpless group of no worldly experience and were playing a game.

The prosecutor too either fails or refuses to understand the damage done and the prejudice engendered by his statements. It was misconduct for the prosecutor particularly to say "if he handled the narcotics in one envelope, if he handled one ounce of narcotics, or a half ounce, or 5 grams, it is as though he handled, possessed, concealed, aided and abetted in the concealment and the sale of all of the narcotics in all of the envelopes". (Tr. p. 34.) In other words, the prosecutor said the defendant could be convicted of handling all of the narcotics involved in this case if he handled 5 grams. That was a gross misstatement of law which now the prosecutor wishes to avoid. We particularly charge that it was misconduct by the prosecuting attorney also to make the statements (Tr. pp. 30-31) and referred to on page 17 of our opening brief because there is no evidence that Stoppelli committed any crime in the State of New York; there is no evidence that he set any criminal forces loose with the intent the act be consummated in California; there is no evidence that Stoppelli sent narcotics to the State of California; there is no evidence that he possessed the narcotics. The harm was done by the prosecutor in using language so loose as to mislead the jury and create prejudice in their minds.

The jury was forced to start with a fixed prejudice against the entire case, each of the defendants, and particularly Stoppelli. Upon such foundation, error such as was committed by the prosecuting attorney and Mr. Greene, together with the thin, if any, evidence against Stoppelli brought about a conviction. Prejudice, in other words, created by connecting the defendant Stoppelli with narcotics and the prosecutor's misstatements of the facts of the case, as they related to the defendant Stoppelli, were sufficient to prevent a fair trial.

The prosecution argues that the holding of *U. S. v. Dressler*, 112 Fed. (2d) 972, is applicable only to a capital case. A reading of the entire decision shows it lays down a general rule applicable to all cases alike.

**THERE WAS A TOTAL FAILURE TO PROVE VENUE IN THE
NORTHERN DISTRICT OF CALIFORNIA.**

All three counts of the indictment charged that the offense was committed in Oakland, California.

In this respect we have never contended that there had to be direct evidence of Stoppelli's presence in the State of California. While it is true that venue may be shown by circumstantial evidence, nevertheless here there is a total lack of evidence of anything being done by Stoppelli in California, or anywhere else. There is no evidence Stoppelli at any time in his whole life was in the State of California.

The prosecution contends that testimony that the envelope with Stoppelli's fingerprint was found in Cali-

ifornia is sufficient to prove venue. The envelope could have passed through 50 hands, starting somewhere in Europe and ending in San Francisco. According to the Government's testimony, the fingerprint could have been as much as four weeks old. In four weeks these narcotics could have traveled twice around the world. There can be no logical inference that Stoppelli was in California.

In fact, the prosecution's brief at page 15, under another point, relates evidence from which the conclusion must be drawn that Stoppelli came from New York for this trial and secondly, to the fact

“There is evidence that the narcotics which were delivered to the undercover operative in Oakland came from New York * * *”

In other words, taking the Government's evidence as true, it shows venue, as far as Stoppelli is concerned, in New York.

In the face of these facts, the prosecution argues that it is the law that venue is to be presumed in California (against the known facts) if the narcotics are found here. There is no decision of any court in the United States to the effect that narcotics being found in one state and the defendant located in another state that venue is fixed where the narcotics are found. All of the reported cases on venue cited by the prosecution are those where the narcotics have been found in the *possession of the defendant*.

In the cases decided by our Appellate Courts the residence and activity of the defendant within the

district has been shown. In all these cases the defendant resided and conducted the activities involved for a long period of time in the jurisdiction of the court. In all these cases it has been shown that the defendants were *possessed* of the narcotics within the district when arrested. In all of these cases it has appeared that the defendant purchased the narcotics. On such a set of facts it is very logical that the place of purchase may be proved by inference to be within the district. Facts make the law, and the facts shown in these cases without the help of any presumption, are sufficient to prove venue. *U. S. v. Karavias*, 170 F. (2d) 968, quoted by the prosecution, is to the effect that it is sufficient if venue can be concluded from the evidence as a whole to be at the place alleged in the indictment. The same rule is enunciated by the Supreme Court in *Casey v. U. S.*, 72 L. Ed. 632. The claim by the prosecution that there is a presumption of venue is a misstatement of this case. The *Casey* case simply holds, as it so succinctly states at page 418:

“But we are of opinion that upon the *facts of this case* the court was right. If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would, and shortly thereafter did, furnish it, the inference that he bought it in Seattle is strong, * * *” (Italics ours.)

The *Casey* case does not agree with the arguments of the prosecution that there is a presumption of venue. The Supreme Court of the United States says:

“But we are of opinion that upon the *facts of this case* the court was right.”

The prosecution puts great weight on the decisions in *Mullaney v. U. S.*, 82 F. (2d) 638, and *Acuna v. U. S.*, 74 F. (2d) 359. In these cases the facts showed venue where the charge was brought.

In the *Acuna* case his long residence in El Paso, Texas and days of activity by him in connection with the narcotics involved in El Paso, Texas were shown. These *facts* clearly showed the venue in El Paso, Texas.

In the *Mullaney* case the defendants sold narcotics in the house where they lived, and the narcotics were found in the same house. The marked money involved was found in one of defendant's beds in the same house. It is the *facts* which fix venue.

It is a prime question whether Judge Haney in writing the *Mullaney* decision correctly interpreted the decision of the Supreme Court in *Casey v. U. S.* Judge Haney's statement that the opinion of the Circuit Court of Appeals in *Casey v. U. S.* was approved by the Supreme Court is incorrect. A close reading of the opinion of the Supreme Court will show that *the opinion is based solely upon the facts as found in that case*. The opinion of the Circuit Court was written without reference to the facts. The Supreme Court didn't base its decision in the *Casey* case on expediency as was done in the Circuit Court of Appeals. We reiterate, it is the facts which make the law.

Furthermore, the Supreme Court in the *Casey* case does not disapprove the decision in *Brightman v.*

U. S., 7 Fed. (2d) 532. *Every case on this point must stand on its own facts.*

The prosecution's interpretation of the evidence is that Stoppelli had possession of one envelope, but the locale of that possession is not shown. In all the reported cases the person was apprehended with the narcotics *in his possession*, so there was little, if any, argument as to venue.

We respectfully urge that the Ninth Circuit Court of Appeals realign the decision in the *Mullaney* case to be upon the facts thereof in accordance with the clear meaning of the decision of the Supreme Court in the *Casey* case.

The prosecution misstates the contentions of appellant (pp. 40-41) when it uses quotations from *U. S. v. Jones* as being contrary to our contentions. We do not contend that venue must be proved by direct evidence. To make such a contention would be to destroy the rules of evidence and proof. Venue may be proved by circumstantial evidence, but circumstantial evidence proving venue must be as strong as circumstantial evidence to prove any other fact in a criminal case. In other words, the circumstantial evidence showing venue in the Northern District of California must be clear, convincing and establish such venue to a moral certainty and beyond a reasonable doubt.

The prosecution throughout its brief constantly refers to rules of aiding and abetting and conspiracy in support of the conviction in this case. This forgets

the fact that the conspiracy has been removed from the picture as far as this appeal is concerned.

The prosecution quotes from *Ford v. U. S.* (p. 42) seemingly contending that quotation is authority in this case. The quotation is no authority herein because it refers to a set of facts where one does an act with the intent it shall take effect in another state. There is no evidence here that Stoppelli did anything at any place, which was to take effect in California..

The prosecution's quotation from *Palmero v. U. S.* (pp. 42 and 43) is misleading because it has not told this court that that was a conspiracy case. The facts in that case are that four men were in a conspiracy to bring opium from Marseilles, France to New York. Two men who were transporting it on a ship were arrested as the ship docked at Boston. Clearly an act was committed by two of the conspirators in Boston, to-wit, possession on board a ship in the course of transporting.

The prosecution (p. 46) gives the hypothetical case of the finding of a dead body in California with a gun near it belonging to a man living in New York. No one as an independent contractor would buy a dead body and a gun in New York and transport it to California, but a person as an independent contractor would buy narcotics and take them to California for his own use. Furthermore, narcotics can pass from one independent contractor to another, many times, which heightens the dissimilarity. Even more glaring is the failure of the prosecution to say where the venue

for the prosecution for murder would be. Would it be in California without proving where the murder was committed?

The prosecution quotes at length from the case of *People v. Frank Jones*, 12 N.Y.S. (2d) 635 where the defendant was convicted of safe blowing on the evidence of his fingerprint upon the safe. The prosecution forgets that in that case evidence was introduced showing that the print of the defendant could not have been innocently placed upon the safe. Here, Stoppelli's print could have been placed upon the envelope when it was empty. Furthermore, Stoppelli's print could have been placed upon the envelope when it had heroin in it, but if he did not know it contained heroin, he would not be guilty of a crime. This is clearly established in that portion of the opinion quoted by the prosecution where, referring to the fingerprint, it is said

“was found under such circumstances that it could only have been impressed at the time when the crime was committed.”

The prosecution argues the holding in *U. S. v. Bruno*, 105 Fed. (2d) 921, sets up a doctrine of resultant criminal responsibility. The *Bruno* case held there was a conspiracy and the conviction was affirmed on the basis of a conspiracy. We repeat that the trial court held there was insufficient evidence of a conspiracy so the *Bruno* case can have no application to the case at bar.

The intensity with which the prosecution presented its case to the jury showed an unparalleled eagerness to get a conviction by any means. The prosecution is guilty of the same conduct in this court when it refers to the case of *U. S. v. Perillo* and tells this court that Stoppelli was involved in that case. The only purpose of the prosecution in so informing this court is another deliberate attempt to prejudice this court against Stoppelli, even as was done by Greene.

CONCLUSION.

The prosecution argues the evils of the narcotic traffic as a ground for affirming the conviction.

We respectfully submit that more important than abolishing the narcotic traffic are the fundamental principles of American law, to-wit: an honest abiding by the rules under which a man is deprived of his liberty.

The scrap or shred of Stoppelli's fingerprint standing alone unconnected with any other circumstances proving his guilt, is insufficient under our system of jurisprudence to sustain a conviction; it creates only a suspicion and is overcome by the presumption of innocence.

The prosecution's case was fatally defective; it being without sufficient proof of the crime and of the venue, when the indictment was returned. These defects were not remedied by proof at the trial.

This conviction comes to this court supported, neither by facts nor law.

Wherefore, it is respectfully submitted that the judgment of conviction should be reversed as to both counts.

Dated, San Francisco, California,
February 20, 1950.

Respectfully submitted,
J. W. EHRLICH,
Attorney for Appellant.

No. 12,373

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN STOPPELLI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

JUL 26 1939

PAUL P. O'BRIEN

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No. 12,373

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN STOPPELLI,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

The opinion of the court does away with the rule of reasonable doubt.

The majority opinion in dealing with weight of the evidence professes at first to follow the instructions of the lower court on the question of reasonable doubt, which were admittedly correct.

However, in reaching a final conclusion the majority opinion abandons the doctrine of reasonable doubt when it says:

“We are not able to conclude as a matter of law that the jury, pursuant to the court’s instructions, could not reasonably draw the inference of guilt from the fingerprint evidence.”

The fallacy of the majority opinion is clear when it says that it cannot conclude that the jury “could not reasonably draw an inference of guilt from the fingerprint evidence.” This is a misstatement of the law. Such statement of the rule does away with the doctrine of reasonable doubt. The converse is true; the question is—has the jury resolved every reasonable doubt in favor of the defendant?

The majority opinion justifies the verdict of the jury if there is any theory upon which the defendant can be found guilty. In other words, it is no longer a question whether there is a reasonable doubt of the defendant’s guilt.

Applying the rule that any reasonable doubt must be resolved in favor of the defendant, the verdict of the jury has nothing but suspicion and assumption to support it. The Government’s fingerprint expert became an expert on other matters. He became an expert on what was in an envelope at a previous date and said it was a powdery substance. On what scientific knowledge is this expert opinion based? If such a science exists, it is not shown. Only an anxious witness can be so proficient.

While an appellate court does not try the facts, we do ask the court to look at the evidence to see if there

is a reasonable hypothesis on which the defendant's innocence can rest. The majority has taken the position that it will not reverse a case unless it feels that "the jury could not reasonably draw an inference of guilt." If this rule is to stand, the doctrine of reasonable doubt is completely destroyed because in every case there is some evidence from which guilt can possibly be inferred.

The rule which this court has set up is contrary to the decisions of the Supreme Court of the United States. The only decisions cited in the majority opinion are civil cases involving actions for personal injuries. The rule in such cases has no application to a criminal case, where all reasonable doubts must be resolved in favor of the defendant.

The majority opinion piles inference on top of assumption in order to reach an inference of guilt. We inquire of this court—why is it necessary to assume that there was heroin in the envelopes when the fingerprint of Stoppelli was placed thereon? The Government expert, willing and anxious as he was to convict the defendant, did not say that the print could not have been caused without a powdery substance being therein. In our briefs we called attention to the fact that many substances could, as a matter of physical science (of which this court can take judicial knowledge) form the basis for the implanting of the fingerprint. We referred to the fact that a bunch of envelopes as they are found in a store could have formed the same base for the fingerprint.

The majority opinion has adopted the assumptions of a biased and prejudiced witness, to-wit, the assumption that there was a powdery substance in the envelopes. This court has not in any way pointed out how the conclusion of the Government witness that there was a powdery substance in the envelope is anything more than the assuming of a needed fact in a chain of circumstantial evidence. In other words, the Government witness assumes facts, which are not necessarily true as a matter of scientific knowledge or evidence, to create an inference of guilt. The majority opinion goes further and changes the powdery substance to heroin.

The majority opinion reflects (p. 3) that the record herein was quickly read and not sufficiently studied. The opinion reads:

“Stoppelli might have had powdered sugar in the envelope to feed his pet canary. But in that event, how did it get into the package of heroin?”

How did what get into the package of heroin? The fingerprint? There was no one package. There were twelve (12) open letter envelopes, in which twelve (12) there were twelve (12) other sealed cellophane envelopes containing heroin.

There is no evidence that Stoppelli was ever near the letter envelopes when they were filled with heroin. The record (pp. 205-13) shows the heroin came to California in bulk and not in envelopes.

We agree that substance must control the decision of this court. But we inquire what substance? Guess-

ing? Conjecture? The filling in of the missing link in a one link chain of circumstantial evidence?

The true administration of criminal justice needs self-restraint on the part of the reviewing court. Restraint from concluding that "a powdery substance" is heroin.

As the majority opinion says:

"No doubt, flights of fancy, to infer innocent possession, could be indulged in."

Is it not equally "flights of fancy" to infer that "a powdery substance" must be heroin?

THE MAJORITY OPINION ON THE QUESTION OF VENUE IS BASED UPON AN ERRONEOUS UNDERSTANDING OF THE FACTS.

The opinion reads:

"The venue point is without merit in view of the provisions of 18 USC 3237."

That section sets forth the rule for venue when an offense is commenced in one district and completed in another.

The court in citing that section lost sight of the fact that the trial judge held there was insufficient evidence to show a conspiracy between Mr. Stoppelli and the other defendants found in Oakland, California, granting a new trial on that count. There is no evidence that Stoppelli was ever in Oakland. Therefore, this case comes before this court for its consideration

without the conspiracy count before it. Without the conspiracy count before it there is nothing to show that Mr. Stoppelli committed any offense in more than one district, to-wit, New York. There is no showing that he delivered narcotics in or to California. In fact, the evidence as quoted in the majority opinion states that one Tony Sapoli brought heroin from New York to California. This section is without the remotest application to the case at bar and the majority opinion is without foundation. *Killian v. U. S.*, C.A.D.C. 29 F. (2d) 455 furnishes no authority for the majority opinion. That decision, if construed to support the majority decision, is contrary to *Casey v. U. S.*, 20 F. (2d) 752, 276 U.S. 413.

It appears that the majority has not considered the opinion of the Supreme Court in *Casey v. U. S.*, in connection with this case because its citation of that code section indicates that it has misunderstood the facts in the case at bar.

The question of venue is a very substantial one because the defendant was convicted of a conspiracy. A reading of the record shows that there was not the slightest evidence of conspiracy. The jury, therefore, convicted Mr. Stoppelli on bias and prejudice because of the joint trial with other defendants.

A trial of Mr. Stoppelli in the proper court without the other defendants would give him a fair trial, and that is what the Constitution of the United States guarantees to him.

CONCLUSION.

To maintain this decision you must destroy the requirement of proof beyond a reasonable doubt. You must destroy the presumption of innocence and permit and direct that the Government's burden of proof in a criminal case shall be no more than creating a vehicle from which a jury may pick any guess it pleases.

The narcotic traffic is a deadly business, but the rights of an individual cannot be sacrificed because narcotics are involved in the issue.

Dated, San Francisco,
July 21, 1950.

Respectfully submitted,
J. W. EHRLICH,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 21, 1950.

J. W. EHRLICH,
*Of Counsel for Appellant
and Petitioner.*

No. 12375

United States
Court of Appeals
For the Ninth Circuit.

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

DEC 22 1949

PAUL P. O'BRIEN,
CLERK

No. 12375

United States
Court of Appeals
For the Ninth Circuit.

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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* Page numbering appearing at foot of page of Certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 20069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AARON SMEHOFF, alias ALLEN SMILEY,
Defendant.

INDICTMENT

[U.S.C., Title 8, Sec. 746(a) (18)—Falsely
claiming citizenship;

U.S.C., Title 8, Sec. 152—False testimony
under oath before an immigrant inspector.]

The grand jury charges:

Count One

[U.S.C., Title 8, Sec. 746(a) (18)]

On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of

the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States. [2]

Count Three

[U.S.C., Title 8, Sec. 746(a) (18)]

On or about May 25, 1944, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States. [4]

A True Bill

/s/ C. J. DORAN,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

[Endorsed]: Filed May 19, 1948. [6]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, Allen Smiley, by his attorney, Otto Christensen, and moves the Court to (a) dismiss said indictment and (b) separately to dismiss each count thereof upon each and all of the following grounds.

I.

That separate and distinct offenses not of the same or similar character and not based on the same act or transaction, or on two or more acts or transactions connected together, or constituting parts of a common scheme or plan, are charged in one and the same indictment.

II.

That there is a misjoinder of offenses in one and the same indictment in that Counts One to Three each charge the defendant with violation of (U.S.C., Title 8, Sec. 746(a) (18), to wit, with fraudulently representing himself to be a citizen of the United States of America, etc., on sundry dates to different persons, each [7] of whom is described *an* an employee, of the City of Beverly Hills, the City of Los Angeles, or the Sheriff's Office of the County of Los Angeles, whereas Court Four of the indictment charges the defendant on a different date with a violation of U.S.C., Title 8, Sec. 152, to wit the crime of perjury, in a hearing before *an an* United States Inspector of Immigration.

III.

Each of Counts One, Two and Three of said indictment does not state facts sufficient to charge the defendant (a) with having committed any crime or offense against the United States of America, and (b) the matters alleged in said indictment do not constitute an offense against the laws of the United States of America.

IV.

That each of said Counts One, Two and Three of said indictment is bad and insufficient in law because it is so uncertain and indefinite in its allegations as not to inform the defendant of the nature and cause of the accusations against him, or thereby give reasonable notice of the specific charges against him, whereby he may properly prepare his defense, or to safeguard himself against a second prosecution for the same offense, in that it cannot be ascertained therefrom:

1. That there was any fraudulent purpose of the defendant in making the alleged statements of citizenship mentioned in said Counts.

2. How or in what manner alleged representation of citizenship was fraudulent.

3. In that it cannot be ascertained whether any of the said persons mentioned in said Counts, as the persons to whom the alleged false representation was made, (a) was one to whom the defendant was obligated to truthfully state the fact of citizenship,

or (b) that any of such persons had a legal right to inquire into [8] or an adequate legal reason for ascertaining the citizenship of the defendant.

4. That the descriptive allegation, "said....., being a person having good reason to inquire into the nationality status of the defendant," is insufficient in law, in that "good reason" (a) constitutes a conclusion, (b) of itself, fails to show a concomitant obligation to truthfully answer, (c) is ambiguous and uncertain, i.e. may be personal, arbitrary or statistical as distinguished from a legal reason which carries the counter legal obligation of a truthful answer, and (d) in itself may constitute a purely idle reason (although to them for their purposes a good reason), i.e. Gallup Poll for statistical purposes, curiosity, etc.

V.

That Count Four of said indictment does not allege sufficient facts to constitute an offense under the laws of the United States of America, and particularly the violation of U.S.C. Title 8, Sec. 152.

VI.

That Court Four of the indictment is bad and insufficient in law because it is so uncertain and indefinite in its allegations as not to inform the defendant of the nature and cause of the accusation against him, or thereby give reasonable notice of the specific charges against him, whereby he may properly prepare his defense, or to safeguard him

against a second prosecution for the same offense, in that it cannot be ascertained therefrom:

(a) That his testimony, to wit: "Q. About the time this case started you were also employed were you not by Harry Rothberg as personnel director in his stores"? "A. Yes," was a material fact in a matter arising under the laws of the United States of America and concern and relate to defendant's right to reside in the United States of America. [9]

(b) What the nature and character of the matter or proceedings were, allegedly arising under the laws of the United States of America, wherein the said testimony of employment would be a material fact concerning and relating to his right to reside in the United States of America, or whether or not he could be found to be a deportable alien, or would invoke an exercise of discretion upon the part of the Attorney General in the particulars alleged.

(c) How or in what manner said alleged testimony concerning employment was a material fact to any issue or related issue in any matter or proceeding arising under the laws of the United States of America and/or concerning and relating to defendant's right to reside in the United States of America.

/s/ OTTO CHRISTENSEN,

Attorney for Defendant. [10]

Points and Authorities

Misjoinder of Offenses

Rule 8, Federal Rules of Criminal Procedure,
Sub-Division (a)

Note to Rule Above:

“This rule is substantially a restatement of existing law.” 18 USCA Section 557.

McElroy v. United States, 164 U. S. 76 41
Law Ed. 355

Beaux Arts Dresses, Inc. v. United States,
9 Fed (2) 531

United States v. Interstate Properties, Inc.,
153 Fed (2) 469

United States v. Perlstein, 120 Fed (2) 276,
at 281

Counts One, Two and Three

United States v. Weber, 71 Fed. Sup. 88

Title 8, Section 746(a), Subparagraph 18, United
States v. Hess, 124 U. S. 483; 31 Law Ed. 516.

See United States v. Carll, 105 U. S. 611 and
United States v. Crunkshank, 92 U. S. 542, cited
in United States v. Weber, 71 Fed Sup. 88 (1947).

See also Lowenburg v. United States, 156 Fed (2)
22, CCA 10th, 1946, and United States v. Max, 156
Fed (2) 13, CCA 3rd.

Count Four

See cases cited preceding point.

The face of the indictment for perjury must show

that statements falsely made were material. *United States v. Seymour*, 50 Fed Sup 930.

An indictment for perjury must aver the facts, showing the [11] materiality of the oath in the proceeding in which it is taken. *United States v. Singleton*, 54 Fed. 488.

“An indictment for perjury must allege that the false oath was with reference to evidence or testimony of material facts, and, if it appears to the Court that they were not material the indictment will be insufficient though the materiality is alleged.”

United States v. Pettus 84 Fed. 791

Opinions of the Board of Review of the Central Office and Board of Appeals of the Immigration and Naturalization Service (U. S. Department of Justice). Copies of these opinions are now being obtained.

The issue of discretion by the Attorney General was and is a false and invalid issue in the immigration proceedings.

People v. Brophy, 120 Pac. (2) 946

Rules and Regulations under this section have force and effect of law.

Haff v. Shee (C.C.A. Cal.) 63 Fed (2) 191
Sec. 222, Title 8, U.S.C. “Rules and Regulations”

(G) p. 848 Immigration and Nationality Laws and Regulations.

(c) Sec. 19, Immigration, Oct. 1917 (U.S.C. Title 8), Section 155.

Ex Parte T Nagata (Cal. D.C.) 11 Fed (2) 178

“Deportation under warrant can only be made for cause charged and stated therein.”

Respectfully submitted,

/s/ OTTO CHRISTENSEN,

Attorney for Defendant.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 3, 1948. [12]

At a stated term, to wit: The February Term. A.D. 1948, of the District Court of the United States of Amercia, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of July in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable C. E. Beaumont,
District Judge.

[Title of Cause.]

Court gives oral opinion and denies motion of defendant to dismiss as to counts 1, 2, and 3 and grants motion as to count 4.

Otto Christensen, Esq., appearing as counsel for defendant, states defendant is ready to plead and waives reading of the Indictment. Defendant pleads not guilty to each of counts 1, 2, and 3. And, there being no objection, Court permits defendant to remain on O/R in these proceedings and orders case

transferred to calendar of Judge Harrison for setting for trial.

E. A. Tolin, Ass't U. S. Att'y, is present for Gov't. [14]

[Title of District Court and Cause.]

INDICTMENT

[U.S.C., Title 8, Sec. 746(a) (18)—False claim of citizenship.]

The grand jury charges:

On or about November 1, 1945, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely, and fraudulently represent to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California, having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas, in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.

A True Bill

/s/ A. H. LONG,

Foreman.

/s/ JAMES M. CARTER,

U. S. Attorney.

EAT:AH

[Endorsed]: Filed March 23, 1949. [15]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 7th day of June in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

For arraignment and plea; E. A. Tolin, Ass't U. S. Att'y, appearing as counsel for Gov't; Otto Christensen, Esq., appearing as counsel for defendant, who is present on bond of \$500.;

Attorney Christensen moves to dismiss the Indictment and adopts his written motion to dismiss made in Case No. 20,069-Cr. as to grounds III and IV thereof, and Attorney Tolin opposes said motion on same argument made in Case No. 20,069-Cr. Counsel submit motion to the Court and it is ordered that motion is denied, and that defendant's plea be taken.

Defendant states his true name is Allen Smiley, acknowledges receipt of a copy of the Indictment, waives reading thereof, and pleads not guilty.

Court orders this cause consolidated for trial with Case No. 20,069-Cr. on Court's own motion and with consent of defendant, and Court orders the said consolidated causes set for trial 10 A.M., July 12, 1949.

On motion of Attorney Christensen it is ordered that Robert Neeb, Esq., is associated as counsel for defendant. [16]

At a stated term, to wit: The February Term. A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 12th day of July in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

These consolidated causes coming on for jury trial; James M. Carter, U. S. Att'y, and E. A. Tolin and Jack E. Hildreth, Ass't U. S. Att'ys, appearing as counsel for Gov't; Otto Christensen and Robert Neeb, Esqs., appearing as counsel for defendant, who is present on O/R; and both sides answering ready, it is ordered that a jury be impaneled. The clerk draws the names of twelve jurors, who take places in the jury box.

Attorney Tolin makes a statement to the prospective jurors in regard to this cause, at request of the Court. Attorney Christensen makes a statement. Counsel for defendant examine the jurors in the box for cause.

The jurors now in the box are examined for cause and passed for cause.

Frank Factor is excused by Gov't and clerk draws name of Benj. Kelman, who is examined and passed for cause.

Marvel A. Morse is excused by defendant and clerk draws name of Arthur W. Stillwell, who is examined and passed for cause.

James F. McDonald is excused by defendant and clerk draws name of Clara A. Knight, who is examined and passed for cause.

Arthur W. Stillwell is excused by Gov't and clerk draws name of Victor Montgomery, who is examined and excused for cause by the Court, and clerk draws name of Theresa Drew, who is examined and passed for cause. [18]

Lula J. Updigrass is excused by Gov't and clerk draws name of Katherine Jackson, who is examined and passed for cause.

Katherine Jackson is excused by defendant and clerk draws name of Matilda Turner, who is examined and passed for cause.

Louise Dermody is excused by Gov't and clerk draws name of George A. Allers, who is examined and passed for cause.

George A. Allers is excused by defendant and clerk draws name of Leo A. Coutt, who is examined and passed for cause.

Cleora A. Lethen is excused by defendant and clerk draws name of Minnie Yodow, who is examined and passed for cause.

Leo E. Coutt is excused by Gov't and clerk draws name of Louella H. Rose, who is examined and passed for cause.

Matilda Turner is excused by defendant and clerk draws name of Robert Titus, who is examined and passed for cause.

Mary A. Winnie is excused by defendant and clerk draws name of Robert V. Rogers, who is examined and passed for cause.

Robert V. Rogers is excused by defendant and clerk draws name of Bertha M. Nunan, who is examined and passed for cause.

Bertha M. Nunan is excused by Gov't and clerk draws name of Mable H. Folsom, who is examined for cause.

At 11:30 A.M. the Court admonishes the prospective jurors not to discuss this cause and declares a recess. At 11:45 A.M. court reconvenes herein and all being present as before, including the prospective jurors, and defendant, and counsel so stipulating, Court orders trial proceed.

Mable H. Folsom, heretofore examined, is passed for cause.

Robert Titus is excused by defendant and clerk draws name of David Kay, who is examined and passed for cause.

And there being no further peremptory challenges, the jurors now in the box are accepted by both sides and sworn as the jury for this trial, viz:

The Jury

1. Lyman Haughland
2. David Kay
3. Caroline A. Resch
4. Clara A. Knight
5. Benj. Kelman
6. Minnie Yodow
7. M. W. Kroopen
8. Louella H. Rose
9. Mable H. Folsom
10. Theresa Drew
11. Margaret S. Pierce
12. Wm. H. Klein

The Court orders that the prospective petit jurors present who were not impaneled for this trial are excused until notified. [19]

At 11:55 A.M. Court admonishes the jury not to discuss this cause and declares a recess to 2 P.M.

At 2:06 P.M. court reconvenes herein and all being present as before, including defendant, counsel for both sides, and the jury, and counsel so stipulating, Court orders trial proceed.

Attorney Tolin makes opening statement to the Court and jury in behalf of Gov't. Counsel for defendant reserve opening statement.

Attorney Neeb makes a motion in behalf of defendant to exclude all witnesses from the court room. Attorney Tolin makes a statement as to the said motion to exclude witnesses. Pursuant to request of defendant, Court orders that all witnesses are excluded from the court room, until called.

Gov't Ex. 1 to 10 incl. are marked for ident.

Lillian M. Hoover is called, sworn, and testifies for Gov't. Gov't Ex. 8 is admitted in evidence.

Ray M. Griffin is called, sworn, and testifies for Gov't. Gov't Ex. 3 is admitted in evidence.

I. E. Sier is called, sworn, and testifies for Gov't. Gov't Ex. 4 is admitted in evidence.

At 3:10 P.M. Court admonishes the jury not to discuss this cause and declares a recess. At 3:25 P.M. court reconvenes herein and all being present as before, including defendant, counsel for both sides, and the jury, and counsel so stipulating, Court orders trial proceed.

Ralph W. Becker, Frank H. Cunningham, and Orville E. Harper, respectively, are called, sworn, and testify for Gov't. Gov't Ex. 11 and 12 are marked for ident., and Gov't Ex. 9 is admitted in evidence.

Thos. A. Cox is called, sworn, and testifies for Gov't.

At 4:15 P.M. Court admonishes the jury not to discuss this cause and declares a recess in this trial until 10 A.M., July 13, 1949. [20]

[Title of District Court and Cause.]

FALSELY CLAIMING CITIZENSHIP

Comes Now the defendant, Allen Smiley, before the introduction of any evidence in the case, and requests the Court to instruct the jury in this case by giving the jury each and every one of the instructions hereto attached, which said instructions are submitted to the Court on this 7th day of June, 1949. Said the instructions hereto attached are marked from numbers 1 to 32, inclusive.

The defendant reserves the right to present further requests for instructions on the ground that he cannot, in advance of the testimony of the case, anticipate all instructions he deems right and proper. At the close of the testimony, the defendant proposes to present further requests for instructions.

/s/ ALLEN SMILEY,

Defendant.

/s/ OTTO CHRISTENSEN,

Attorney for Defendant.

CONTENTS OF PRELIMINARY REQUESTS TO CHARGE

1. Indictment no evidence of guilt.
2. Issue is presented by specific charge in the indictment, which is to be decided solely on evidence and not on conjecture, passion, prejudice, etc.
3. Jury sole judges of facts.

4. Jury not to be influenced by anything except evidence and not to be influenced by rulings or comments of the Court.

5. Judge facts only upon testimony and evidence in this case. Disregard evidence stricken out. Disregard any intimation in any question.

6. Rulings of the Court are not to be taken as any indication of guilt or innocence. Counsel are charged with duty of objecting.

7. Rule regarding failure of defendant to testify.

8. Plea of not guilty serves as continuing denial.

9. Presumption of innocence.

10. Reconcile testimony with innocence.

11. Reasonable doubt defined. Evidence must establish truth of charges to a moral certainty. Chief Justice Shaw instruction.

12. Reconcile any and all circumstances and whole evidence of case with innocence of defendant.

13. Definition of word, "innocence."

14. Circumstantial evidence must exclude every hypothesis of guilt, hypothesis of guilt must flow naturally from facts proved.

15. Every fact or circumstance must be proved beyond a reasonable doubt before it may be considered.

16. Charge in indictment.

17. The six elements of each count of indictment.

18. Defining "good reason."

19. In furtherance of official authority and duty.

20. Person inquiring must have right or adequate reason in furtherance of his official authority.

21. False statement insufficient if mere boast or jest, etc.

22. "Falsely" defined as "perfidiously," "treacherously" or "with intent to defraud."

23. "Willful" defined and applied. [22]

24. Person inquiring must be engaged in inquiry making nationality status relevant and material.

25. Representation must be made for a fraudulent purpose.

26. Fraudulent purpose applied to this case.

27. Statements made to persons named not in course of judicial proceedings or under oath—questions concerning citizenship immaterial to matters under question and defendant under no legal requirements to answer.

28. Defendant not required to answer as to citizenship on local investigations and charges.

29. Same.

30. Inquiry by police officer in connection with arrest for gambling imposes no obligations to answer truthfully.

31. Individual opinion of jurors required.

32. Individual opinion of jurors required. [23]

INSTRUCTION No. 2

We are here for the purpose of trying the issues of fact that are presented by the specific charge in this indictment only and the plea of the defendant thereto. This duty you should perform unin-

fluenced by passion or prejudice on account of the nature of the charge against the defendant. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

[In pencil]: Insert in General Charge.
Given:

.....
Judge. [24]

INSTRUCTION No. 18

The burden of proof is upon the prosecution to prove the guilt of the defendant by evidence beyond a reasonable doubt. (The defendant is not called upon to produce any evidence whatsoever as to his innocence.) All of the presumptions of law, independent of evidence, are in favor of the innocence of the defendant. The law presumes the defendant who has been charged with a criminal offense to be innocent until his guilt has been proven beyond all reasonable doubt. This presumption of innocence abides with the defendant throughout the trial and entitled the defendant to a verdict of not guilty unless the evidence in the case, when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt.

Given:

/s/ DAVE W. LING,
Judge.

[In pencil]: Insert in General Charge. [25]

INSTRUCTION No. 7

The failure of a defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against such defendant nor should this fact enter into the discussions or deliberations of the jury in any manner.

Given:

/s/ DAVE W. LING,
Judge.

See: Bruno v. U.S. 308 U.S., 287,292. [26]

INSTRUCTION No. 8

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment. (You are further instructed that throughout the trial the defendant's plea of not guilty serves as his "continuing denial of the evidence offered against him by the prosecution pursuant to its ever present burden of proof.")

Given:

/s/ DAVE W. LING,
Judge.

See: U.S. v. DeAngelo (CAA 3) 8319; Prettyman v. U.S. 180 F. 30, 42 (CCA 6); Smith v. U.S. 28 F. 131, 133 (CCA 8). [27]

INSTRUCTION No. 13

You must clearly bear in mind that when the Court speaks of innocence, or of a circumstance being susceptible of a hypothesis of innocence, the word innocence is not used in the sense of pure, moral, free from venality, or free from wrongdoing. What is meant is innocence of the particular and specific crime charge in the indictment.

Given:

/s/ DAVE W. LING,
Judge. [28]

INSTRUCTION No. 14

Circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by the defendant, or in other words, the facts proved must be all consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all. If the evidence can be reasonably reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

Given:

/s/ DAVE W. LING,
Judge.

U.S. v. Daneri, Case No. 1963 (Judge Yankwich); Nichola v. U.S. 72 Fed. (2d) 780; Paddock v. U.S. 79 Fed. (2d) 872, 876; Coffin v. U.S. 156 U.S. 432. [29]

INSTRUCTION No. 17

You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:

1. That the defendant was not at the time of making the alleged representation a citizen of the United States.

2. That he made the representation to the person mentioned in the indictment.

3. That at the time of making said representation that the defendant then and there knew that it was false.

4. That the defendant willfully made such false representation.

5. That he fraudulently made the representation of citizenship.

6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant.

Given:

/s/ DAVE W. LING,
Judge. [30]

INSTRUCTION No. 19

The Court instructs you with reference to the allegation in the indictment that the person to whom the alleged false representation of citizenship was made “had a good reason to inquire into the nationality status of the defendant” that the phrase “good reason to inquire” means more than any reason, or which might be deemed by such person inquiring to be a good reason; it means as applied to this case that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant’s citizenship.

Given:

/s/ DAVE W. LING,
Judge.

U.S. v. Achtner (CCA2), 144 Fed. (2) 49, 51;
U.S. v. DePratu (CCA), 171 Fed (2) 75, 76. [31]

INSTRUCTION No. 21

You are further instructed that even though you find that the defendant made a false representation of citizenship to the persons or any one of the persons named in the indictment, you must nevertheless find the defendant not guilty if you find such representation was made “as a mere boast” or “jest” or “to stop the prying of some busy-body.”

Given:

/s/ DAVE W. LING,
Judge.

INSTRUCTION No. 22

You are further instructed that the word, "falsely," as used in this indictment suggests more than a mere untruth and includes "perfidiously," "treacherously," or "with intent to defraud." As applied to this case, false representation or claim of citizenship must be made to one who has a right to inquire into or has an adequate reason for ascertaining the citizenship of the one making the representation or claim.

Given:

/s/ DAVE W. LING,
Judge.

U. S. v. Achtner (CCA2), 114 Fed. (2) 49, 51

U. S. v. Tenderic (CCA7), 152 Fed. (2) 3, 5

U. S. v. Weber, 71 Fed. Sup. 88 [33]

INSTRUCTION No. 23

You are further instructed, even though you believe beyond a reasonable doubt that the defendant did represent to the person named in any count of the indictment that he, the defendant, was a citizen of the United States, and that such representation was in fact untrue, before you may convict on such count you must further find beyond a reasonable doubt that such representation was not due to surprise, inadvertence or mistake, or duress, but due to "willfulness." "Willfulness" means more than "intentional" or "voluntary"; it means done with a bad purpose, without justifiable excuse, without ground for believing it lawful.

As applied to this case, "willfulness" means that before you may convict, you must believe beyond a reasonable doubt the defendant represented that he was a citizen of the United States as alleged, and that such representation was not only knowingly false but also given with a bad purpose, without justifiable excuse, and without ground for believing it lawful.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Murdock, 73 L. Ed. 22 5

People v. Turner, 122 Cal. 679, 55 P. 685

U. S. v. Smiley (Cr. 20188), Instruction
given by Judge Beaumont. [34]

INSTRUCTION No. 7S

The charge in this case is that the defendant falsely represented himself to be a citizen of the United States. It is not sufficient to merely show an answer of "yes" to an oral or written question concerning citizenship asked by a local peace officer in connection with a booking concerning an alleged violation of local or state gambling laws or in connection with an interview while held as a material witness.

(You are instructed, that to "represent oneself" as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States.) and the mere answering of a question as to whether one is a citizen asked of him by an arresting officer in connection with an alleged violation of local, municipal or

state law, in and of itself does not constitute representing, as that term is used in the indictment.

Given: As Modified

/s/ DAVE W. LING,
Judge. [35]

INSTRUCTION No. 24

You are further instructed that even though you believe without a reasonable doubt that the defendant falsely represented himself to be a citizen of the United States to a person inquiring as to his nationality status, as alleged in the indictment or any count thereof, *Before you can convict*, you must further find beyond a reasonable doubt that *the person inquiring concerning the Nationality Status of def.* was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.

Given:

/s/ DAVE W. LING,
Judge.

See above cases supra:

U. S. v. Achtner;

U. S. v. Tenderic;

U. S. DePratu; and

U. S. v. Weber, 71 Fed. Sup 88. [36]

[Proposed instruction, with modifications by District Judge as shown in italics.]

INSTRUCTION No. 25

You are further instructed, even though you believe beyond a reasonable doubt that the defendant did represent to the person named in a count of the indictment that he, the defendant, was a citizen of

Before you can the United States, and that such representation was in fact untrue, before you may convict on such count you must further find ~~beyond a reasonable doubt that such~~ representation was not only knowingly false and due to willfulness, but was made for a fraudulent purpose.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Achtner (CCA2), 144 Fed. (2) 49,
51;

U. S. v. Tenderic (CCA7), 152 Fed. (2)
3, 5;

U. S. v. Weber, 71 Fed. Sup. 88. [37]

[Proposed instruction, with modifications by
District Judge as shown in italics.]

INSTRUCTION No. 26

As applied to this case, “fraudulent purpose” means ~~that before you may convict the defendant you must believe beyond a reasonable doubt that~~ such representation was not only knowingly false and due to willfulness but was made with intent to deceive such persons as to a material matter.

Given:

/s/ DAVE W. LING,

Judge.

U. S. v. Achtner (CCA 2), 144 Fed. (2) 49, 51;

U. S. v. Tenderic (CCA7), 152 Fed. (2) 3, 5;

U. S. v. Weber, 71 Fed. Sup. 88.

See cases cited p. 52, Achtner case supra. [38]

INSTRUCTION No. 27

Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions.

Refused:

/s/ DAVE W. LING,
Judge. [39]

INSTRUCTION No. 28

The person arrested on a charge of violating municipal or state laws, or who is the subject of an investigation concerning a violation of municipal

or state laws, is not required to answer any questions whatsoever put to him by the municipal or state arresting or investigating officers concerning his place of birth or citizenship.

Refused:

/s/ DAVE W. LING,
Judge. [40]

INSTRUCTION No. 29

A person interviewed by police officers of a city or county in connection with an investigation into the alleged commission of a local offense, even though the investigation concerns the acts and conduct of a third person, is not compelled in law to answer any questions put to him by such officers as to his citizenship or where he was born.

Refused:

/s/ DAVE W. LING,
Judge. [41]

INSTRUCTION No. 30

Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged violation of gambling laws as to the place of such individual's birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully.

Refused:

.....
Judge [42]

INSTRUCTION No. 32

While it is the duty of the jurors to confer and deliberate with one another before arriving at a verdict, nevertheless, the verdict which you render must represent the real judgment and honest conclusion of each of you. If any juror, after such deliberation, conscientiously reaches a decision on the facts, he has no right to surrender his decision to the opinion of the majority for the purpose of preventing a disagreement or for the purpose of arriving at a compromise.

Given:

/s/ DAVE W. LING,
Judge.

[Endorsed]: Filed Aug. 29, 1949. [43]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by the plaintiff and defendant in the above-entitled cause, through their respective attorneys, that Supplemental Instructions 8s and 9s be included in the transcript of record on appeal by the Clerk of this Court.

Dated this 4th day of October, 1949.

/s/ JAMES M. CARTER,
By /s/ ERNEST A. TOLIN,
His Assistant,
Attorney for Plaintiff.
/s/ OTTO CHRISTENSEN,
Attorney for Defendant.

INSTRUCTION No. 8S

Mere spoken words by the person arrested for an alleged violation of local, municipal or state gambling laws by a peace officer as to whether the person arrested was a citizen, is not of itself a claim to United States citizenship.

Given:

.....

Judge. [45]

INSTRUCTION No. 9S

You are instructed that when the Court uses the language "in furtherance of his official authority and duty," this phrase means something more than any act by an officer, even though said act be performed in connection with his employment; it means an act authorized by law and in furtherance of a duty imposed upon him by law.

Given:

.....

Judge.

[Endorsed]: Filed Oct. 5, 1949. [46]

[Title of District Court and Cause.]

VERDICT

We the Jury in the above-entitled cause find the defendant Allen Smiley, charged as Aaron Smehoff, Guilty as charged in Count 1 of the indictment; and Guilty as charged in Count 3 of the indictment.

/s/ M. N. KROOPEN,
Foreman.

Dated: July 14, 1949.

[Endorsed]: Filed July 14, 1949. [47]

(Title of District Court and Cause.)

VERDICT

We the Jury in the above entitled cause find the defendant Allen Smiley, Guilty as charged in the indictment.

Dated: July 14, 1949.

/s/ M. N. KROOPEN,
Foreman.

Dated: July 14, 1949.

[Endorsed]: Filed July 14, 1949. [48]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant, Allen Smiley, and

moves the Court to grant him a new trial for the following reasons:

1. The Court erred in failing to give the series of instructions requested by the defendant to the effect that he was not required to answer questions put to him by the police officers at the time of his arrest.

2. The Court erred in permitting testimony concerning the comity arrangements between police agencies in exchanging information concerning arrests.

3. The verdict of "Guilty" under the state of the evidence was contrary to the Court's instructions.

4. The evidence was insufficient to establish the offense.

/s/ OTTO CHRISTENSEN,

/s/ ROBERT NEEB,

Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed July 19, 1949. [49]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes Now the defendant, Allen Smiley, and moves the Court to arrest judgment, for the reasons that each of the counts of the indictment fails

to charge an offense, and the court is without jurisdiction to enter judgment of the offense.

/s/ OTTO CHRISTENSEN,

/s/ ROBERT NEEB,

Attorneys for Defendant.

Receipt of copy attached.

[Endorsed]: Filed July 19, 1949. [50]

At a stated term, to wit: The February Term. A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

For (1) hearing motion of defendant for new trial and motion of defendant in arrest of judgment, (2) sentence on counts 1 and 3, and (3) disposition of count 2; count 4 having been heretofore dismissed; E. A. Tolin, Ass't U.S. Att'y, appearing as counsel for Gov't; Otto Christensen, Esq., appearing as counsel for defendant, who is present on O/R;

Attorney Christensen argues in support of motion of defendant for a new trial and in arrest of judgment. Attorney Tolin replies.

Court pronounces judgment as follows: * * *

Court orders motion for new trial and in arrest of judgment denied, but inasmuch as there is a debatable question, the defendant will be admitted to bail in the sum of \$10,000., pending appeal.

On motion of Attorney Tolin it is ordered that count 2 of Indictment is dismissed. Court further orders defendant released to custody of Otto Christensen, Esq., his attorney. [52]

At a stated term, to wit: The February Term. A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of August, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Dave W. Ling,
District Judge.

[Title of Cause.]

For (1) hearing motion of defendant for new trial and motion of defendant in arrest of judgment, and (2) sentence; E. A. Tolin, Ass't U.S. Att'y, appearing as counsel for Gov't; Otto Christ-

ensen, Esq., appearing as counsel for defendant, who is present on O/R; Court orders motion (1) denied, and pronounces judgment as follows: * * *

District Court of the United States for the Southern District of California, Central Division
No. 20069-Criminal

UNITED STATES OF AMERICA,

vs.

ALLEN SMILEY.

JUDGMENT AND COMMITMENT

On this first day of August, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Otto Christensen, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of falsely claiming citizenship in violation of Section 746(a)(18), Title 8, U. S. Code, as charged in each of counts one and three of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year on count one of the Indictment in an institution to be selected by the Attorney General, and in addition thereto pay a fine unto the United States of America in the sum of \$1000.00; and, on count three of the Indictment, for a period of one (1) year in an institution to be selected by the Attorney General, and in addition thereto, pay a fine unto the United States of America in the sum of \$1000.00; said sentence of imprisonment on count one to begin and run concurrently with sentence of imprisonment on count three.

It Is Adjudged that on motion of the U. S. Attorney, count two of the Indictment is hereby dismissed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed Aug. 1, 1949. [53]

District Court of the United States for the
Southern District of California, Central Division
No. 20604-Criminal

UNITED STATES OF AMERICA,

vs.

ALLEN SMILEY.

JUDGMENT AND COMMITMENT

On this first day of August, 1949, came the attorney for the government and the defendant appeared in person and by counsel, Otto Christensen, Esq.,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of false claim of citizenship in violation of Section 746(a)(18), Title 8, U.S. Code, as charged in the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year in an institution to be selected by the Attorney General, and in addition thereto to pay a fine unto the United States of America in the sum of \$1000.00; said term of imprisonment to begin and run concurrently with

sentene of imprisonment of one year imposed in case No. 20069-Criminal, United States of America, v. Allen Smiley.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
U. S. District Judge.

[Endorsed]: Filed Aug. 1, 1949. [55]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza,
Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Robert Neeb, Chester Williams Building, Los Angeles 13, California, attorneys for Appellant.

Offense: Appellant was convicted on July 14, 1949, of a violation of U.S.C., Title 8, Sec. 746(a) (18), charging in three counts of an indictment that Appellant on or about June 21, 1947, November 1, 1945, and May 25, 1944, to certain persons described as peace officers falsely represented himself to be a citizen of the United States of America.

Date of Judgment: July 25, 1949.

Judgment and/or sentence: Committed to cus-

tody of Attorney General for one year on count one and a \$1000. fine; the same on count three of indictment #20069; the same on indictment #20604; said sentences to run concurrently. Said appellant is now at large on bail pending determination of his appeal. [56]

Name of prison where now confined, if not on bail:

I, the above-named Appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

ALLEN SMILEY,

Appellant.

By /s/ OTTO CHRISTENSEN,

OTTO CHRISTENSEN and

ROBERT NEEB,

Attorneys for Appellant.

By /s/ OTTO CHRISTENSEN.

1. That each count of the indictment fails to allege facts to constitute an offense under the laws of the United States.

2. That the Court was without jurisdiction to pronounce judgment and sentence.

3. That the Court erred in overruling Appellant's Motion to Dismiss said indictment and each count thereof upon each of the grounds separately stated in his Motion to Dismiss.

4. That the Court erred in his overrulings in the admission of testimony on the trial.

5. That the Court erred in his overrulings in the exclusion of testimony on the trial.

6. That the Court erred in failing to grant Appellant's Motion at the conclusion of all of the evidence to dismiss each count of the indictment and/or direct the jury to find the Defendant not guilty as to each count of the indictment.

7. That Court erred in failing to give certain instructions to the jury as requested by the Appellant.

8. That the Court erred in giving certain instructions to the jury to which instructions the Appellant duly excepted. [57]

9. The verdict of guilty was inconsistent with, contrary and repugnant to the Court's instructions to the jury.

10. The Court erred in overruling Appellant's Motion in Arrest of Judgment.

11. The Court erred in pronouncing judgment and sentence.

OTTO CHRISTENSEN and
ROBERT NEEB,

Attorneys for Appellant,

By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Aug. 1, 1949. [58]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREON

Points on Which Appellant Intends to
Rely on Appeal

I.

The Court erred in overruling Appellant's Motion to Dismiss counts one and three of Indictment 20069 and Indictment 20604.

II.

The Court erred in its rulings on the admission of testimony and exhibits.

III.

The Court erred at the conclusion of all of the evidence in the case to grant Defendant's Motion for Judgment of Acquittal and to dismiss on the grounds that the evidence was insufficient to establish the offense charged as to each count of the Indictment 20069 and Indictment 20604.

IV.

The Court erred in its instructions to the jury.

V.

The Court erred in failing to give instructions to the jury requested by the Defendant.

VI.

The evidence was insufficient to establish the offense.

VII.

The verdict was inconsistent with, contrary and repugnant to the Court's instructions.

IX.

The Court erred in denying Defendant's Motion in Arrest of Judgment.

X.

The Court erred in imposing Judgment and Sentence.

Designation of Record

Print the entire transcript of record as filed by the Clerk of the District Court.

OTTO CHRISTENSEN,

Attorney for Appellant.

/s/ OTTO CHRISTENSEN.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 22, 1949. [60]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court:

1. Counts one and three of Indictment 20069, and Indictment 20604.

2. Motions to Dismiss Indictment 20069, and

Order of Court thereon; Stipulation re Motion to Dismiss Indictment 20604; Court Reporter's transcript re Motion to Dismiss Indictment 20604 and Court's Order thereon.

3. Plea of Defendant to said Indictments.

4. Such necessary recitation of impanelment of jury to show a jury trial was had.

5. Court Reporter's transcript of all the testimony and proceedings of the trial; and Court Reporter's transcript of proceedings on the settlement of instructions, and the instructions given and refused.

6. Certification of all exhibits and/or photostatic copies thereof to be included. [63]

7. Order of Court denying Motions to Dismiss Indictments.

8. Order of Court denying Motions for Acquittal and Judgment of Dismissal, at the conclusion of the evidence in the case.

9. Verdicts.

10. Motions for New Trial and Arrest of Judgment, and Orders of Court thereon.

11. Judgments and Sentences and Reporters' Transcript thereon.

12. Notice of Appeal.

13. Designation of Points relied on.

/s/ OTTO CHRISTENSEN,
Attorney for Defendant.

Receipt of copy attached.

[Endorsed]: Filed Aug. 22, 1949. [64]

United States District Court for the Southern
District of California, Central Division
No. 20,069

UNITED STATES OF AMERICA,
Plaintiff,
vs.

AARON SMEHOFF, alias ALLEN SMILEY,
Defendant.

Honorable Jacob Weinberger, Judge Presiding.

REPORTER'S
TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

JAMES M. CARTER,
United States Attorney; by
ERNEST A. TOLIN,
Assistant United States Attorney.

For the Defendant:

OTTO CHRISTENSEN, ESQ.,
1212 Spring Arcade Building,
Los Angeles, California. [1*]

June 7, 1949, 10:00 o'Clock A.M.

The Court: Call the calendar.

The Clerk: No. 20,069, Criminal, United States
vs. Allen Smiley.

Mr. Tolin: The government is ready.

The Clerk: Is anyone here for the defendant?
Is the defendant present?

* Page numbering appearing at top of page of original Reporter's Transcript.

The Court: He probably has gone to Judge McCormick's court.

The Clerk: No. 20,604, Criminal, United States vs. Aaron Smehoff.

Mr. Tolin: The government is ready.

The Court: Are there arraignments to be had here?

Mr. Christensen: Yes. I think under the stipulation, your Honor, that was signed to consent to the arraignment and plea on this day, there is a substitute for Count 2, upon which the defendant has not been arraigned. That consent also carried with it, your Honor, the stipulation that the motions heretofore filed would be considered as having been filed to this substitute for Count 2.

The Court: Those motions are what?

Mr. Christensen: Specifically, your Honor, the indictment [2] on which the motion for a bill of particulars was filed was Case 20,069. It is an indictment in four counts and the one now is 20,604.

The Court: That indictment is in one count?

Mr. Christensen: Yes, your Honor; and that is really taking the place of Count 2 of the old indictment, 20,069. And we want the benefit of the motion to dismiss and the motion for a bill of particulars to this new count, 20,064.

Mr. Tolin: There wasn't a motion for a bill of particulars as to those counts.

Mr. Christensen: I think that is right. That was as to the fourth count of the old indictment, to which Judge Beaumont sustained a demurrer, leav-

ing it upon the three counts.

The Court: This was a motion to dismiss,
Mr. Christensen: Yes; upon sundry grounds,
your Honor.

The Court: And the same principles involved
that you urged before?

Mr. Christensen: The same principles are in-
volved here and they are identical.

The Court: You may state generally into the
record just what your motion is.

Mr. Christensen: The motion as to indictment
20,069, which I want to apply to indictment 20,604,
is that the count does not state facts sufficient to
charge the defendant (a) with having committed
any crime or offense against the United [3] States
of America, and (b) the matters alleged in said
indictment do not constitute an offense against the
laws of the United States of America.

That was Part III in my motion to dismiss the
previous indictment.

And my ground IV in that motion is this, which
I adopt for the indictment and to the indictment
20,604: That each of said Counts 1, 2 and 3 of said
indictment is bad and insufficient in law because it
is so uncertain and indefinite in its allegations as
not to inform the defendant of the nature and
cause of the accusations against him, or thereby
give reasonable notice of the specific charges against
him, whereby he may properly prepare his defense,
or to safeguard himself against a second prosecu-
tion for the same offense, in that it cannot be
ascertained therefrom:

1. That there was any fraudulent purpose of the defendant in making the alleged statements of citizenship mentioned in said counts.

2. How or in what manner alleged representation of citizenship was fraudulent.

3. In that it cannot be ascertained whether any of the said persons mentioned in said counts, as the persons to whom the alleged false representation was made, (a) was one to whom the defendant was obligated to truthfully state the fact of citizenship, or (b) that any of such persons had a [4] legal right to inquire into or an adequate legal reason for ascertaining the citizenship of the defendant.

4. That the descriptive allegation, "said, being a person having good reason to inquire into the nationality status of the defendant," is insufficient at law, in that "good reason" (a) constitutes a conclusion, (b) of itself, fails to show a concomitant obligation to truthfully answer, (c) is ambiguous and uncertain, i.e. may be personal, arbitrary or statistical as distinguished from a legal reason which carries the counter legal obligation of a truthful answer, and (d) in itself may constitute a purely idle reason (although to them for their purposes a good reason), i.e. Gallup poll for statistical purposes, curiosity, etc.

Those were the grounds to the previous indictment and those are the grounds which we adopt to the substitute for Count 2, now indictment No. 20,604. I will submit it without argument.

Mr. Tolin: The government will adopt the brief which it has filed in opposition to a like motion in

Case No. 20,069, and direct the court's attention to the fact that the motion was denied when it was made in that case.

The Court: The motion is denied. You may proceed with the arraignment and plea.

The Clerk: This is in No. 20,604, Criminal, United States vs. Aaron Smehoff. Aaron Smehoff, is that your true [5] name?

The Defendant: No. My true name is Allen Smiley.

The Clerk: S-m-i-l-e-y?

The Defendant: That is right.

The Clerk: Mr. Christensen, do you have a copy of the indictment? If not, here is a copy.

Mr. Christensen: Yes; I have one.

The Clerk: Allen Smiley, you are advised that an indictment has been filed in this court charging you with a violation of the laws of the United States.

Mr. Christensen: We will waive reading of the indictment.

The Clerk: Have you advised him of his rights?

Mr. Christensen: Yes.

The Clerk: Do you want this copy?

Mr. Tolin: Mr. Christensen has already received the two of them.

The Court: Have you a copy of the indictment?

Mr. Christensen: Yes; I have, your Honor.

The Clerk: Is the defendant ready to plead?

The Defendant: Yes.

The Clerk: Do you waive the reading of the charges?

Mr. Christensen: We waive the reading.

The Clerk: Allen Smiley, what is your plea to the indictment? Are you guilty or not guilty? [6]

The Defendant: Not guilty.

The Court: Are these two indictments to be tried together? Is there a stipulation in the record?

Mr. Christensen: I think under the law they would properly be consolidated.

The Court: If they haven't been, there should be some order at this time.

Mr. Tolin: I move that such an order be made.

The Court: Is there any objection?

Mr. Christensen: No objection.

The Court: Very well. The two indictments shall be tried together. What is the estimate of the trial time? We have had a preliminary estimate, which was made in some other court. I would like to know from you gentlemen, first, what time will be required in the trial of this case, as closely as you can guess.

Mr. Tolin: That is something that is speculation, your Honor. We have tried these cases in less than an hour and sometimes they take longer. I thought three days would cover this one and allow ample time.

Mr. Christensen: I made an estimate originally that it would probably take ten days but, after reviewing the situation, I would say somewhere between three to six days, and that depends entirely on what policy I will adopt upon the trial. [7]

The Court: That creates a situation in this court that will make it impossible for the case to be tried at this time. We are behind in our calendar

some two or three weeks, I think, of short cases of people who are in jail awaiting trial.

Mr. Tolin: If the court please, may I inform the court that this case to which the indictment applies, which we are to try, was returned on the 18th of May, 1948, and the new indictment, which was returned on the 23rd day of March, is merely a restatement of one of those old counts. The case is not, therefore, a new one before the court. While we appreciate, of course, the difficulty that has arisen here, as I understand, that there are two judges of the court ill and that your Honor is having difficulty in assigning cases out for trial, however, the government considers this case one of major importance on this calendar. We have been specifically directed by the Attorney General's office to prosecute it with all possible proper speed. So we are ready and we trust, if your Honor does find it impossible to try the case today, that it will not be continued very long in the future. We also have many witnesses here.

Mr. Christensen: The status of the matter as far as a continuance is concerned is this. I think there were three or four indictments and arguments and, finally, it led up to indictment 20,069 and a demurrer was sustained to the fourth [8] count. Then that subject matter was the subject of a new indictment. The government elected to try that last indictment first. In other words, it was their judgment that that was their best case. That was set, your Honor, as quickly as possible after that and was tried last October. This case we are speaking

of, 20,069, did not get on the calendar until February. It was set for some day in April. At that time I asked for a continuance because I was actively engaged in trial, and then it was continued to this date by Judge Mathes. So there is just the one continuance.

Mr. Tolin: Of course, in the interval the Court of Appeals for the Ninth Circuit, in a case that it decided last December, has removed many of the issues which were argued in the motions to dismiss and came to the same conclusion in a similar case that Judge Beaumont came to when he declined to dismiss this one. I think that will simplify and shorten the issues for trial.

The Court: This is just an illustration of what is going to happen in the case. You gentlemen have different viewpoints, and I don't doubt for a moment that it will not take less than five or six days if you are going to pursue the various points that you have had up for discussion in the case. If it is going to take that long, I can't try these cases. I wish I could try them all one after the other but it can't be done. Our policy is to try the short cases in this department [9] and the longer cases, that will take four days or over, go to another department.

We find ourselves in the position now where some of our regular judges, one or two of them, are incapacitated for the time being. We are going to have some help from other sources. One judge is coming in here in July. He will be here July 12th or 13th and either he or I will try this case, de-

pending on how the calendar is made up of other cases that are to be tried. By that time I hope to make up the backlog on these other cases. People who are in jail awaiting trial have the preference and should be tried first. That is the situation as it exists.

Mr. Tolin: I had a call from the Attorney General's office last week, in which the instruction was given to me to proceed if possible and that, if the defendant moved for a further continuance, to resist it. So the case is one of considerable interest in the Department of Justice. I don't think the date your Honor mentioned in July is too far away. However, we are ready today if we can possibly find a way to take care of it.

The Court: If I could take six days out for the trial of this case, I would be glad to go ahead but, as I have stated before, these other cases must be tried and I am trying to overcome my backlog on the shorter cases awaiting trial.

Mr. Christensen: What date in July, your Honor? [10]

The Court: I will agree that this case should be tried as other cases should be tried, expeditiously. I would say on July 12th.

Mr. Christensen: That is satisfactory to me.

Mr. Tolin: Does the defendant personally consent to that?

The Defendant: Yes.

Mr. Christiansen: I am agreeable.

The Court: As I stated, the case will be tried here or by one of the outside judges.

Mr. Christensen: Yes, sir.

The Court: And you approximate the time as about six days, do you?

Mr. Christensen: Yes; I would approximate the examination about six days and I will try to shorten it if possible.

The Court: Our experience here is that these 2- or 3-day cases usually drag out to six days or more.

Mr. Christensen: May I now associate Mr. Robert Neeb in this case also as an attorney of record?

The Court: His name may be entered as an associate. Is there bail on this new charge?

Mr. Tolin: I don't think there is any necessity for bail on the new charge, your Honor. There has been bail on the old charge and the defendant has always been present and is present now. [11]

The Court: What is the bail now, if any?

Mr. Neeb: \$5000.

The Court: In which case was that deposited?

Mr. Tolin: That bail was actually in neither of these cases. It was in a companion case. A superceding indictment has been returned.

The Court: That case is still alive, is it?

Mr. Christensen: Yes.

Mr. Tolin: We kept that case alive in order that there would not be the necessity of a new bail. If we dismissed, it would require a bail in this case and I understand the bonding companies do not like to transfer from one case to another.

The Court: Are you satisfied to allow the bail to remain?

Mr. Tolin: Yes, your Honor; we are satisfied.

The Court: Very well.

The Clerk: The old case isn't on the calendar, is it?

Mr. Tolin: No.

The Court: If it is a live case, it should be on the calendar.

Mr. Tolin: May we refer to it as the old case now, informally, and I will bring the file in to the clerk so that he may enter it.

The Clerk: Do you mean you want it placed on the calendar [12] the same date as these are?

Mr. Tolin: Yes.

The Court: That isn't the case that has been consolidated, is it?

Mr. Tolin: No.

The Court: All of these cases are reset for July 12, at 10:00 o'clock. [13]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of September, A.D., 1949.

/s/ ROSS REYNOLDS,
Official Reporter.

[Endorsed]: Filed Sept. 22, 1949.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Honorable Dave W. Ling, Judge presiding.
No. 20069 Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY (charged as AARON SME-
HOFF),
Defendant.

No. 20604 Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY (charged as AARON SME-
HOFF),
Defendant.

REPORTERS' TRANSCRIPT OF
PROCEEDINGS

Tuesday, July 12, 1949, 10:00 a.m.

The Clerk: No. 20069 Criminal, United States
of America vs. Allen Smiley, charged as Aaron
Smehoff; No. 20604 Criminal, United States of
America vs. Allen Smiley, charged as Aaron Sme-
hoff; for consolidated jury trial.

Mr. Tolin: The government is ready.

Mr. Christensen: We are ready, your Honor,
with this statement that I direct attention to. I be-
lieve that was Indictment No. 20069?

The Court: That is the way it appears on this calendar.

Mr. Christensen: I direct your Honor's attention to Count 4. That count was dismissed on motion of the defense and an argument before Judge Beaumont, so it is not a part of the case.

The Court: That appears on the calendar, also.

The Clerk: Shall I call the jury, your Honor?

The Court: Yes.

(Whereupon a jury was duly impaneled and sworn.)

The Court: All jurors except those engaged in the trial of this case will remain in the courtroom. You will be notified in a few minutes when and where to return.

As far as the case now on trial, court will stand at recess until 2:00 o'clock. Keep in mind the admonition heretofore given you. [5*]

Mr. Kay was not in the jury box before our recess, at which time I admonished the jury. You understand that during the trial of the case you are not to discuss the case among yourselves, nor permit anyone to discuss it with you. You will also avoid forming or expressing any opinion upon any subject connected with it. I shan't tell you this each time we recess or adjourn, but you must bear it in mind throughout the course of the trial. That is all.

The Clerk: 2:00 p.m.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [6]

* Page numbering appearing at top of page of original Reporter's Transcript.

Tuesday, July 12, 1949, 2:00 p.m.

The Court: You may proceed, gentlemen.

Mr. Tolin: I will hand to Mr. Christensen for the defendant a copy of the trial memorandum, the original of which was delivered to the court's chambers during recess.

Shall I make an opening statement?

The Court: If you wish to.

Mr. Christensen: I may say, Mr. Tolin, that I have served my proposed instructions and the authorities upon which we rely are set forth in those instructions, which constitutes our trial memorandum for the present.

Mr. Tolin: I note the presence of the defendant. May it be stipulated that the jury is present?

Mr. Christensen: So stipulated.

Opening Statement on Behalf of the Plaintiff

Mr. Tolin: May it please the Court and members of the jury. It becomes my duty as government attorney in this case to make an opening statement, which is a bit more full than what I stated this morning as to the nature of the case, but still isn't the argument which you will hear at the close of the case. Nor is it evidence of any kind. What Mr. Christensen and Mr. Neeb and what I say to you, and what Mr. Hildreth, who is associated with me, might say to you, is of course argument or a statement. The evidence is that which [7] comes in in the form of documents which you will see or have read to you, and what comes from the mouths of the witnesses on the witness stand. But it is the

custom, and we hope a useful one, for the attorneys at the outset of the case to make an opening statement in order that you may more fully appreciate what the case is, and may aid you as to what to look for in the evidence.

As Mr. Christensen pointed out to you, we are trying three very narrow issues here. That is, the defendant is charged with just three offenses. They are very simple crimes. I will tell you briefly what they are.

I will first comment that it is the expectation of the government to prove each and every allegation of the two indictments.

The defendant, Allen Smiley, was born in Russia in the year 1907 or thereabouts. His family name was Smehoff, S-m-e-h-o-f-f, and the parents gave this defendant the name Aaron. I think it has been said somewhere in the record that Allen Smiley is the English form of Aaron Smehoff. Whether that is so or not, we don't care. I am just mentioning these two names to you because both names will appear in the evidence. They both relate to this man seated here at the end of the counsel table, who is the defendant on trial. [8]

After a time the Smehoff family moved away from Russia. They went to Canada. The defendant is here. He has never become a citizen of the United States nor ever received what are called first papers. He has remained at all times a citizen of some other country other than that of the United States.

In 1944 defendant Smiley was in the Los Angeles sheriff's office being booked.

I will remind you again he is not being tried here for anything except the claim that he was a citizen of the United States made at a time when he wasn't.

Count 1 relates to that time in 1944 when Officer J. E. Siu of the Los Angeles Sheriff's Department had Mr. Smiley in custody and undertook to book him and asked the usual identification questions, so they would know who they had to check back on the facts.

This defendant at that time told Deputy Sheriff Siu that he had lived in this country 18 years and this state 18 years and was born in New York and had lived in this country all his life, which added together spell out a statement that he was a citizen of the United States.

Mr. Christensen: Now, just a moment. That I object to, your Honor, because that is not actually the law on the proposition, that it spells that out. That is a question for your Honor to determine rather than counsel stating that it [9] does spell that out, so I must object to it.

The Court: All right.

Mr. Tolin: Then there came the carrying on through of that booking transaction, which was started by Mr. Siu, and another officer came into it and the overall questions: "Are you a citizen of the United States," and so forth, were then asked and he said, yes, that he was a citizen of the United States.

Time marched on to a day in 1945. The defendant was in the custody of officers of the Los Angeles City Police Department. They brought him in to the Los Angeles City Police Station to be booked.

Again he was asked the identification questions such as his height and weight and his age, and so on. And he said to those officers there at that time that he was a citizen of the United States; that he had been in the state of California for 20 years; that he had been in the United States 38 years and that he was 38 years of age.

Then he answered the other customary questions that are asked for the identification of people who are arrested. That is, he told about his education and made a statement concerning his marital status and other questions of that sort.

On that occasion, after he had told those things to the officers, it was typed up on a Los Angeles Police Department [10] identification report and he was given that report to sign and he did sign it, signing the name Allen Smiley and it was placed in the identification files of the records of the Los Angeles Police Department.

Then time went on to a day in 1947. In 1947 a man was murdered in Beverly Hills and this defendant was there at the scene of the crime.

I am not contending here that he had anything to do with the murder. I am not saying anything one way or the other on that but it is part of the background of this count.

The officers who went out to the house where Mr. Siegel lay dead brought Mr. Smiley into the Beverly Hills police station, as they would anyone there at such a place at such a time and under those circumstances. [11]

And the Beverly Hills Police Department undertook to book him. Officer Cox of that department, now employed in a bank here, but then the booking officer at the Beverly Hills Police Station, asked Mr. Smiley the usual identification questions, and of course among them there came the questions about the duration of his time in the country, and he gave that statement which was to the effect that he had been here all his life. And what was his nationality. And he said that he was an American. And that was entered up by the officer.

We must prove in this case that those statements were made. And as to any one count which we don't prove, that count fails.

We must prove that they were wilfully made; that is, that they were consciously made, he knowing that he was making them, and there wasn't any unconsciousness connected with his statement. That is, that it was a full and open statement made with the intention of making it, with the intention of making it as it was made.

Mr. Smiley, we will show you, was not under any misapprehension. He didn't believe he was a citizen of the United States. He knew very well he wasn't.

Of course you can appreciate, sitting here in a jury box in Los Angeles, that it would be most difficult to get the records from the little town in Russia here for you, so I [12] won't undertake to do that. But during the war years we had a law in the United States that every person residing in the United States who was not a citizen thereof was required to go to the Immigration and Naturalization Service and register as an alien, stating what country he was a citizen of. That had to be done within a certain period of time, shortly after the commencement of hostilities. Mr. Smiley didn't get there until long after it should have been done, but he did get there and did make the statement. We will have that statement in evidence, a statement signed by this defendant, and in it he says he was born in Russia. Also, in it he says that he is a citizen either of Russia or of Canada. If you believe that he did go down there and make that statement, and did register as an alien, we contend it will establish that he was an alien as of that time. But he went down there and made that statement before he committed these crimes. That is to say, before he told Officer Cox at the Beverly Hills Police Station, on the occasion of the investigation of the murder, and before he told the officer in the county jail, and before he signed the statement in the city jail, before those things were done he went down to the Immigration Service. So to counter the outside possibility that maybe he had become naturalized in the interval between the time he registered

as an alien, and the time that he went about saying that he was a citizen, we will produce the [13] officers of the Naturalization Service who will tell you that a search of the records of those persons naturalized in the district where this defendant's application for naturalization would be heard, had he ever made one, a search of those records doesn't show that he was ever naturalized.

Then as an excess of caution I will introduce a certificate from the Director of the Naturalization Service for the entire United States, and that will show that this defendant was never naturalized.

That brings the case down to these simple elements: When arrested in 1944 and asked by the——

Mr. Christensen: Now, if your Honor please, he stated what his proofs are, so it looks as if it is going to be argument from here on out, so it has now served the function of an opening statement of what he intends to prove.

Mr. Tolin: Mr. Christensen, you objected that I was too brief this morning; now I am too prolix. I will give up and sit down.

Mr. Christensen: I want to ask one question that I am very much concerned about. You forgot to mention whether or not you were going to call Mr. Hamilton from the Immigration Department, and that is one thing we had a stipulation on.

Mr. Tolin: No, I don't expect to call him, but pursuant to my understanding with you he is here.

Mr. Christensen: That is fine. [14]

Mr. Tolin: He is here. I think that anything

he can say is outside the scope of this case, but he is here if you want him, and I will ask him to stay throughout the trial.

Mr. Christensen: I think there was a record that he did testify as to citizenship before Mr. Hamilton, and that is why I provoke that thought.

Mr. Tolin: Let me know what you want.

The Court: There is a thing I noticed in the record that I would like to inquire about here. There was a statement there that he would be arraigned upon the date of trial. Has he ever been arraigned?

The Clerk: He has been arraigned.

Mr. Tolin: That matter has been disposed of and he was arraigned at that time.

Is that correct, Mr. Christensen?

Mr. Christensen: Yes.

The Court: Do you wish to make a statement?

Mr. Christensen: No, your Honor. We will reserve our opening statement.

The Court: Call your first witness.

Mr. Neeb: Your Honor, before any witness is called, I would move that we have all witnesses excluded, other than perhaps an officer that may be assisting Mr. Tolin. I don't know who that might be.

Mr. Tolin: Mr. Logan Lane of the FBI, and Mr. Kidder [15] of the Immigration and Naturalization Service are here from those two agencies assisting me. The other officers are merely witnesses

from agencies that are not directly assisting in the case.

I don't think this is the type of case, though, your Honor, where witnesses are going to be almost entirely peace officers and testify regarding booking transactions, that it is the sort of case in which witnesses are ordinarily excluded. I think it makes for some inconvenience to exclude them.

The Court: Why would it? There is a witness room out here that they can occupy.

Mr. Tolin: If the court thinks they should be, I am not objecting, particularly.

The Court: I think so. I don't know anything about it, but upon that request they will be. Call the names of them.

Mr. Tolin: Does the court wish me to call the names of the witnesses?

The Court: Yes.

Mr. Tolin: Mr. J. E. Siu, Mr. Dunn, Bill Hamilton. He is the one you want?

Mr. Christensen: I thought you were going to have him, too.

Mr. Tolin: I don't need him. Mr. Ray Griffin, Mr. Cox, Mr. R. B. Becker, Lt. H. F. Cunningham, or the officer [16] whom he has sent with records, Miss Pearl Harrison, Orville E. Harper, Milton S. Hopkins, Elmer V. Jackson, Martin L. McIntire, Rudolph Wellpott, M. W. Zeno, Lillian Hoover, and I think Mrs. Hoover gave me the name of another party this morning that I don't recall. Mrs. Harrison.

So far as I know, those are the specific witnesses. There may be other people who have been sent by the Sheriff of this County, the Police Department of this City, or the Police Department of Beverly Hills, or by the Immigration Service, and whose names I don't know, but who have come in here in response to the request that they bring records.

The Court: Who do you want excepted from the operation of the rule?

Mr. Tolin: I would like to have Mr. Logan Lane of the FBI and Mr. Marshall Kidder of the Immigration Service.

Mr. Christensen: No objection.

The Court: All right. The other witnesses will retire to the witness room. [17]

Mr. Tolin: I think it will perhaps expedite the handling of these exhibits as well as making them available to all counsel if I have them all marked for identification now, if the court doesn't object to it.

The Court: Very well.

Mr. Tolin: I ask that there be marked for identification a document headed "Application for Registry of an Alien."

The Clerk: Plaintiff's Exhibit 1 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for Identification.)

Mr. Tolin: I ask there be marked for identification a document headed "Alien Registration Form."

The Clerk: Plaintiff's Exhibit 2 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for Identification.)

Mr. Tolin: I ask that there be marked for identification a document dated June 3, 1949, entitled "Certificate of Non-Existence of Naturalization Record."

The Clerk: Plaintiff's Exhibit 3 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for Identification.)

Mr. Tolin: I ask that there be marked for identification a document headed "Sheriff's Department, Los Angeles County, Record of Arrest."

The Clerk: Plaintiff's Exhibit 4 for Identification. [18]

(The document referred to was marked Plaintiff's Exhibit No. 4 for Identification.)

Mr. Tolin: Some of these excluded witnesses have some of the original documents, but I have a photostat, so may this photostat headed "Booking Slip, Los Angeles County Jail," be offered for Identification?

The Clerk: Plaintiff's Exhibit 5 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 5 for Identification.)

Mr. Tolin: I offer for Identification a file clipped together with the certification of the district director, Immigration and Naturalization

Service. The file is headed "Immigration and Naturalization File."

The Clerk: Plaintiff's Exhibit 6 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for Identification.)

Mr. Tolin: I offer for identification a photostat marked "Beverly Hills Department of Police Arrest Report."

The Clerk: Plaintiff's Exhibit 7 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 7 for Identification.)

Mr. Tolin: I offer for Identification a document headed "Apartment Lease."

The Clerk: Plaintiff's Exhibit 8 for Identification. [19]

(The document referred to was marked Plaintiff's Exhibit No. 8 for Identification.)

Mr. Tolin: There are others that I don't have immediately. Will it be all right, Mr. Christensen, if I offer some of these not-so-clear photostats and substitute the good ones when they come in?

Mr. Christensen: That is all right. No objection.

Mr. Tolin: Los Angeles Police Department Identification Report.

The Clerk: Plaintiff's Exhibit No. 9 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 9 for Identification.)

Mr. Tolin: Los Angeles Police Department File Copy of Fingerprint Record.

The Clerk: Plaintiff's Exhibit 10 for Identification.

(The document referred to was marked Plaintiff's Exhibit No. 10 for Identification.)

Mr. Tolin: I will call as a witness Lillian May Hoover.

LILLIAN MAY HOOVER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Lillian May Hoover. [20]

Direct Examination

By Mr. Tolin:

Q. Mrs. Hoover, where do you live?

A. At Sunset Plaza, 1220 Sunset Plaza Drive.

Q. Is that an apartment house?

A. Yes, it is.

Q. And the address that you gave is in what city? A. Los Angeles.

Q. Los Angeles, California? A. Yes.

Q. Do you have some connection with that apartment house other than just living there?

A. I own it.

Q. You are the owner of it? A. Yes.

Q. Do you know the defendant Allen Smiley who is seated here at the end of the counsel table?

A. Yes, I do.

Q. Did you ever seen him about that apartment house? A. Yes, I have.

(Testimony of Lillian May Hoover.)

Q. Is he a tenant there? A. Yes.

Q. Do you know how long he has been a tenant?

A. Since '44, I think.

Q. Placed on the little table before you is a document [21] that appears to be a lease. Will you examine it, please? A. Yes.

Q. Is that a lease of one of the apartments in the address which you have just given?

A. Yes.

Q. And is that the lease of the apartment occupied by Mr. Smiley? A. Yes.

Q. Have you seen him in and around and in use of that apartment between the date that that lease bears and the present time? A. Yes.

Q. He has been a resident there during that time? A. Yes.

Mr. Tolin: I offer in evidence Exhibit 8 for Identification, which is the lease.

Mr. Christensen: Your Honor, may I suggest that perhaps we withhold the offering of this exhibit at this time and then offer them all at the conclusion and then we can make our objections, if any?

That perhaps will facilitate the trial as well as dealing with them as a group rather than singly.

The Court: Do you have any objection to this exhibit?

Mr. Christensen: Well, other than as to materiality and relevancy as far as this trial is concerned. I still [22] can't see where it is relevant

(Testimony of Lillian May Hoover.)

or material. It may become so later on but at the moment I can't see it.

Mr. Tolin: Then I will state it. I have called this witness somewhat out of order because I understand either she or the lady with her isn't well and they wanted to get away.

I am offering it to show his place of residence in order to lay the foundation for the record of non-naturalization, because a man applies for and receives naturalization in the district wherein he is a resident.

Mr. Christensen: Mr. Tolin, I have not the slightest objection in calling this witness or any other witness out of order, but wouldn't it be expedient when you may be calling them out of order to simply reserve the actual offer and put on your testimony and they can all go in at one time?

Mr. Tolin: I think the relevancy is apparent and I will stand on my offer.

The Court: The exhibit may be received.

Mr' Christensen: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 8 and received in evidence.)

Mr. Tolin: I have completed the direct examination of this witness.

Cross-Examination

By Mr. Christensen:

Q. Mrs. Hoover, I will ask you just where this

(Testimony of Lillian May Hoover.)

apartment [23] house of yours is located. Is it in the city of Los Angeles or Beverly Hills?

A. It is 1220 Sunset Plaza Drive.

Q. And is that in Los Angeles or Beverly Hills?

A. It is in Los Angeles.

Q. Bordering on Beverly Hills?

A. I beg your pardon?

Q. Bordering on Beverly Hills?

A. The water is from Beverly Hills?

Q. I say it is bordering on Beverly Hills.

A. Yes, it is.

Q. And how big an apartment building is it?

A. Twenty-five apartments.

Q. And you have owned it how long?

A. We built in in '37.

Q. 1937. And Mr. Smiley, you say, has been a resident there since June 6, 1944? A. Yes.

Q. Has he been absent during any periods of time since June 1944? A. I do not know.

Q. Have you yourself been there constantly since June 6, 1944 or have you gone away on any extended trips? A. I have been away on extended trips.

Q. You have? [24]

A. Yes.

Q. For what periods?

A. I was away four years ago in June for six weeks. I was away the year previous to that for three months and I was—each year I have been away for perhaps six weeks, a month to six weeks or three months—two and three months.

(Testimony of Lillian May Hoover.)

Q. But intermittently during the existence of this lease Mr. Smiley has been a resident at this apartment of yours? A. Yes.

Q. That is an exclusive apartment, is it not?

A. It is.

Q. In fact, the very apartment that he occupied was the one that was previously occupied by Lana Turner, isn't that correct? A. Yes.

Mr. Tolin: I object to that as irrelevant and immaterial.

The Court: Yes; I will sustain the objection.

Q. (By Mr. Christensen): The persons who are tenants of yours are all highly respectable individuals?

Mr. Tolin: Objected to as irrelevant and immaterial.

The Court: And probably calls for a conclusion of the witness.

Mr. Tolin: I will object on that ground, too.

The Court: The objection will be sustained.

Mr. Christensen: That is all.

Mr. Tolin: May the witness be excused?

The Court: Yes.

Mr. Tolin: I will call Mr. Griffin.

RAY E. GRIFFIN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Ray E. Griffin.

(Testimony of Ray E. Griffin.)

Direct Examination

By Mr. Tolin:

Q. Mr. Griffin, what is your business or occupation?

A. I am with the Immigration and Naturalization Service.

Q. Of the United States? A. Yes, sir.

Q. How long have you been so employed?

A. Approximately 24 years.

Q. Do you have any special position there?

A. Yes. I am chief of the Nationality and Status Section.

Q. What is the general work of that section?

A. We have to do with the naturalization of aliens in this area, immediate area mainly. [26]

Q. Who is Henry Colarelli?

A. He is one of the officials of our service in our central office in Washington. I don't know his official title offhand.

Q. I show you a document which is marked Exhibit 3 for identification.

Is that some kind of an official document issued by the Immigration and Naturalization Service?

A. Yes, it is.

Q. What is it?

Mr. Christensen: I think it speaks for itself, doesn't it?

The Court: Go ahead.

The Witness: It is a certification signed by Mr. L. Paul Winning, General Counsel of the Immi-

(Testimony of Ray E. Griffin.)

gration and Naturalization Service as to the non-existence of a naturalization record. I haven't read this before.

Q. (By Mr. Tolin): I am just asking you as to the title of the document.

A. That is what it is.

Q. Now, Mr. Griffin, do you have something to do with the records of persons who are naturalized—that is, become citizens of the United States by the naturalization process? A. Yes.

Q. Within some particular district? [27]

A. Yes, sir.

Q. And what district is it that you are concerned with in your work?

A. That is the district which comprises the southern portion of the State of California, two counties in Arizona and one in Nevada with headquarters in Los Angeles. [28]

Q. What counties in Nevada?

A. The one of which Las Vegas is the county seat. I have forgotten what the county is now.

Q. Would it include the City of Las Vegas?

A. Yes. Las Vegas is the county seat.

Q. And the county of which Las Vegas is the county seat? A. Yes.

Q. And it would include one other county?

A. Not in Nevada, no.

Q. Would it include all of Los Angeles, Hollywood, and Beverly Hills? A. Yes.

Q. In fact, everything in Southern California?

(Testimony of Ray E. Griffin.)

A. That is correct.

Q. What do you mean by "Southern California"? What is the dividing line?

A. The line—the northern boundary is along the Counties of San Luis Obispo and Kern, a line extending across the state, that being the northern boundary.

Q. Would it include that address known as 1220 Sunset Plaza Drive, Hollywood, California?

A. Yes, sir.

Q. Do you have in your office a record of persons who have achieved citizenship in the United States by the [29] naturalization process within that area? A. We do.

Q. Have you examined it to determine whether one Aaron Smehoff or one Allen Smiley has been naturalized? A. Yes, sir.

Q. Have they, according to those records?

A. We could find no record under either of those names.

Mr. Tolin: I have concluded the direct examination of Mr. Griffin.

Mr. Christensen: No cross-examination.

Mr. Tolin: I offer Exhibit 3 for identification in evidence.

The Court: It may be admitted.

The Clerk: Exhibit 3 admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 3 and was received in evidence.)

(Witness excused.)

Mr. Tolin: I call Mr. Siu, J. E. Siu.

Mr. Hildreth, would you mind going to the witness room and getting the original document of which Exhibit 5 is a photostat?

Mr. Christensen: You can use that and substitute the other one later, as far as I am concerned.

Mr. Tolin: Thank you. [30]

JACOB E. SIU

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Jacob E. Siu.

Direct Examination

By Mr. Tolin:

Q. Mr. Siu, what is your business?

A. Deputy sheriff, Los Angeles County.

Q. How long have you been so employed?

A. Seven years.

Q. Do you know the defendant, Allen Smiley?

A. I do.

Q. Under what name do you know him?

A. Allen Smiley.

Q. Did you have occasion to be present at a time when Allen Smiley was in custody of the Los Angeles County Sheriff's office? A. Yes.

Q. When was that?

A. May, approximately the 25th, 1944.

Q. Where?

(Testimony of Jacob E. Siu.)

A. I first met him at the Sunset Towers on Sunset Boulevard.

Q. And after you met him at the Sunset Towers did you [31] proceed to some other place with him?

A. I placed him under arrest first and then took him to our office located at 414½ North Hill Street in Los Angeles.

Q. When you arrived at your office did you book him upon some charge.

A. Yes, I booked him on 836-3 of 337-A.

Q. When you book a man what happens? Tell the jury generally what is meant by booking.

A. We have an arrest slip and it states the name, middle name and last name. I write that down in my own handwriting. The address where he lives, and where he is arrested at. The date of arrest, color of his hair, color of his eyes, his weight and height. And the next line says, "Previous arrests." The answer was "Yes."

Mr. Christensen: Now, just a moment. I move to strike that out, if the Court please. He is asking for a general description of a routine of booking, rather than as to a specific booking.

Q. (By Mr. Tolin): Yes, Mr. Siu, what we want here is what is meant by "booking."

A. Booking is getting the information down on paper before we take them to the County Jail.

Q. Then the prisoner is taken to the jail, is he?

A. Yes.

(Testimony of Jacob E. Siu.)

Q. And that information that you take down on paper, [32] what happens to it?

A. Well, that goes to the booking office and that is copied on another piece of paper, I think it is triplicate.

Q. Do you know the purpose of the Sheriff's office in taking that information?

A. For a matter of record, identification.

Q. You have in your hand Exhibit 4, for identification, don't you? A. Yes.

Q. Do you recognize that as a document that you used in connection with the booking of Allen Smiley?

A. Yes, this is the arrest slip that I made out.

Q. Where did you get the information that you put on there? A. By asking Mr. Smiley.

Q. By Mr. Smiley, do you mean the defendant?

A. The defendant, yes.

Q. Did you ask him all the questions as to which there are answers on there? A. Yes.

Q. Who gave you the answers?

A. Mr. Smiley.

Q. I will direct your attention particularly to the questions regarding length of time in the United States. Is there a question there about that? [33]

A. It says, "Years lived in county." The answer is, "18 years." "In the state?" "18 years." "In U. S." "Life."

Q. Did he tell you his age?

(Testimony of Jacob E. Siu.)

A. The age was 37.

Q. Where did you get that information?

A. He told me.

Q. Did he give you all that information that you have now recited about the answers?

A. Yes, sir.

Q. Then, after you got that information, did you write it down yourself? A. Yes, sir.

Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record?

Mr. Christensen: That is still for identification, so we don't mix the record up. That is the only reason why I interrupt.

Mr. Tolin: Yes.

The Witness: This was made out in the County Jail.

Q. (By Mr. Tolin): Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest?

A. Yes, it is.

Q. Do you recognize it as an official document of the Sheriff's department kept by it in the regular course of [34] business? A. Yes.

Mr. Neeb: I object to this. Unless this man is the one that keeps those particular records, it would be hearsay on his part. He has not been qualified as to what records the county keeps, except that he makes the booking himself.

Q. (By Mr. Tolin): Do you know, Mr. Siu?

A. I signed this booking.

(Testimony of Jacob E. Siu.)

Q. You signed it? A. Yes.

Q. And is it a record that is required to be kept in connection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked?

A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification?

A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that?

A. No, I didn't make that out.

Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was.

Q. Was it part of the same booking transaction? [35] A. Yes, it was.

Q. Do you know who made it out?

A. The clerk up in the County Jail. I don't know his name.

Q. Did the defendant Smiley give the information?

A. No. He took it off the arrest slip.

Q. Did you have any other conversation with the defendant Smiley in the course of either the arrest or the transit to the jail, or your interviews

(Testimony of Jacob E. Siu.)

with him in connection with the alleged offense, concerning his citizenship?

A. No other conversation other than what I asked him when I made out the arrest slip.

Mr. Tolin: I have concluded the direct examination.

Mr. Christensen: May I see the record?

Mr. Tolin: Counsel desired to see what the witness had been looking at, so I will hand to Mr. Christensen and Mr. Neeb Exhibits 4 and 5, for identification.

Cross-Examination

By Mr. Christensen:

Q. Mr. Siu, directing your attention now to Exhibit 4 for identification, that is the slip that you had in your hand, was it not, and what you have been testifying from? A. Yes.

Q. As I understand your testimony, you made this slip out yourself, is that right? Is that in your handwriting? [36]

A. That is my handwriting, yes.

Q. You say you were present at the time that Mr. Smiley was arrested?

A. Yes, he was standing on the other side of the counter when I asked him those questions.

Q. You took him, did you, from this address, 8358 Sunset Boulevard, to where?

A. 414½ North Hill Street. That is our Vice Squad office. Took him there to ask him questions before we book him in the County Jail.

(Testimony of Jacob E. Siu.)

Q. In other words, you took him there and interrogated him? A. Yes.

Q. You interrogated him there? A. Yes.

Q. Any other officers present at the time?

A. At the time of the booking?

Q. At the time of your arresting him at this Sunset address. A. Yes.

Mr. Tolin: Pardon me. I think some of the jurors are indicating difficulty in hearing.

Mr. Christensen: Very well, I will talk a little louder, ladies and gentlemen.

Q. (By Mr. Christensen): Were there other officers [37] present at the time you made this arrest on Sunset Boulevard?

A. Yes. Captain Deal, Acting Lieutenant Manning, myself, Deputy Kapic, and Schaffer.

Q. So you six officers then took him down to this address at 444 Hill Street?

A. Five of us made the arrest.

Q. At that point there were these officers also present? A. Well, we booked——

Q. I am asking you if these five officers were also present at that time?

A. Making the slip out?

Q. Yes.

A. There was one other, I forget which one it was now, the one—Siegel.

Mr. Tolin: Mr. Christensen, one of the jurors says he can't hear.

A Juror: The witness. Not the attorney.

(Testimony of Jacob E. Siu.)

Q. (By Mr. Christensen): Let me ask you this question, then. Talk a little louder, Mr. Siu.

Mr. Tolin: Pardon me. Before you do that, could we have the reporter read back the last few questions and answers?

Mr. Christensen: Very well.

The Court: All right. Go ahead.

(The record was read by the reporter.) [38]

Mr. Christensen: Shall I continue, your Honor, or do you recess in the afternoon at 3:00 o'clock.

The Court: You may finish with this witness.

Mr. Christensen: Very well.

Q. Now, you say there were all of these officers present interrogating Mr. Smiley at this address on Hill Street, is that correct, Mr. Siu?

A. That is right.

Q. And how long did you interrogate him?

A. Oh, I imagine about a half hour.

Q. All of you officers were present at the time?

A. Most of the time.

Q. And was he locked up at that time?

A. No.

Q. Then you at that time in the presence of these officers booked him?

A. I think it was Schafer or Kopic (phonetic) that booked Benjamin Siegel.

Q. I didn't ask you that question.

I move that be stricken, your Honor.

The Court: It may be stricken.

(Testimony of Jacob E. Siu.)

Q. (By Mr. Christensen): I am asking about Mr. Smiley. A. Yes.

Q. He was arrested, I see here you mention 836-3. That is supposed to be a gambling charge, is it not? [39]

A. Suspicion of bookmaking.

Q. And had you known Mr. Smiley before?

A. No. Never saw him in my life.

Q. This was back in 1944? A. Yes.

Q. You book a great many people, don't you, during the course of a year?

A. That is right.

Q. Do you remember booking anyone else on this particular day? A. Benjamin Siegel.

Q. Aside from him whom else did you book?

A. No others.

Q. And your recollection feeds back, does it, to that time, that is, that it was this Mr. Smiley that you asked questions of, is that right?

A. Yes, sir.

Q. Do you know who you booked the next day?

A. No, I don't.

Q. This is in your handwriting, you say?

A. Yes, sir.

Q. Now, you have booked hundreds of people, haven't you? A. Yes, sir.

Q. And isn't it a fact that sometimes you don't get [40] the information solely and alone from the individuals that you book?

(Testimony of Jacob E. Siu.)

A. I put down what the answers are that they give me.

Q. Don't sometimes some of the other officers give you information and that goes on the booking slip? A. No.

Q. Don't you on occasions frequently find a recalcitrant citizen who refuses to answer questions of police officers? A. Yes.

Q. You have found that happen? A. Yes.

Q. And you still have to make a booking slip for identification purposes, don't you?

A. Yes, sir.

Q. And that is all this is for, is simply to identify the individual whom you have under arrest?

A. Yes.

Q. Now, there is no specific purpose beyond that for such booking slip?

Mr. Tolin: Objected to as calling for a conclusion of the witness.

Mr. Christensen: He already testified to that on direct examination.

The Court: I think so. [41]

The Witness: Do you want me to answer it?

Q. (By Mr. Christensen): Yes.

A. We make out a booking slip for identification and the charge that they are booked on.

Q. Well, in the event that Mr. Smiley had refused to answer these questions where would you then and how would you obtain the information that would identify him at that time?

(Testimony of Jacob E. Siu.)

Mr. Tolin: Objected to as irrelevant.

The Court: Yes. Objection is sustained.

Q. (By Mr. Christensen): Now, these are the only questions that you would ask him—these specific questions on this booking slip, Exhibit 4, is that correct? A. That is right.

Q. His age, his residence or his citizenship. That would all have to appear on this slip, Exhibit 4, as far as anything you asked him is concerned, is that right? A. Yes, sir.

Q. Then, directing your attention, Mr. Siu, to Exhibit 5 for identification, the photostatic copy, as I understand it, you had nothing to do with typing the information that appears on that exhibit, is that right?

A. This information in typewriter is written by a clerk and after it is made out I sign it. My signature is here.

Q. I see. [42]

Mr. Tolin: You are referring to Exhibit 5?

Mr. Christensen: Yes, Exhibit 5.

Q. So when a clerk at the County Jail booking office then made out this booking slip Exhibit 5 for identification, you then signed it?

A. That is right.

Q. You didn't interrogate then Mr. Smiley any further? A. No.

Mr. Christensen: That is all, your Honor.

Mr. Tolin: I offer Exhibit 4 in evidence.

(Testimony of Jacob E. Siu.)

The Court: It may be received.

(The document referred to was marked Plaintiff's Exhibit No. 4 and received in evidence.)

Mr. Christensen: If your Honor please, there is some information on that exhibit which if it goes before the jury——

The Court: I know what you are referring to. It probably should be deleted some way.

Mr. Christensen: Yes. We want to show the disposition of the matter but we don't want to try collateral issues.

The Court: I don't know how that can be accomplished.

Mr. Tolin: We are not trying that case.

The Court: I know, but it probably shouldn't be called to the attention of the jury either.

Mr. Tolin: It was counsel who brought it out. Of [43] course, it does show the right of the police department to inquire. Your Honor knows that a claim to citizenship, in order to ground a prosecution, has to be made under serious circumstances—that is, it is not a flippant statement in jest.

The Court: Let me see the document.

Mr. Christensen: I have much argument to offer on that subject but this perhaps is not the time to do so. I have a totally different view from what counsel just expressed on the subject.

Mr. Tolin: What I have expressed is the law

(Testimony of Jacob E. Siu.)

of the case and your motion to dismiss is on that basis.

Mr. Christensen: And that is the time when we will reach it.

The Court: I think it may be received.

We will have our afternoon recess at this time. The jury will keep in mind the court's admonition. That is all of this witness?

Mr. Tolin: That is all I have.

The Court: All right, you may be excused.

The court will stand at recess for five minutes.

(Recess.) [44]

Mr. Tolin: Call Mr. Becker.

RALPH W. BECKER

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Ralph W. Becker.

Mr. Tolin: We have been using a photostat of the Los Angeles County Jail booking slip. I now have in hand a duplicate original. May that be substituted in the record in lieu of the photostat?

Mr. Christensen: Yes.

The Clerk: That is Exhibit 5.

Direct Examination

By Mr. Tolin:

Q. Mr. Becker, I place before you Exhibit 5,

(Testimony of Ralph W. Becker.)

for identification. Will you tell us your occupation, please?

A. Deputy Sheriff of Los Angeles County. I am assigned——

Q. Go ahead.

A. ——assigned to the Records and Communications Division.

Q. What are your duties in that work?

A. Part of my duties is keeping records.

Q. Records of what?

A. Of the identification of persons booked in the Los [45] Angeles County Jail.

Q. You have before you Exhibit 5, for identification. Do you know what that is? A. I do.

Q. What is it?

A. It is a booking slip of the Los Angeles County Jail.

Q. Concerning whom?

A. The name appearing on the face is Allen Smiley.

Q. Is it an original record? A. It is.

Q. Is it kept by you in the ordinary and regular course of business of the Los Angeles County Sheriff's Office? A. It is.

Q. Is it required by the rules under which you work to be kept? A. Yes, sir.

Mr. Tolin: You may cross-examine.

Mr. Christensen: No cross-examination.

Mr. Tolin: Mr. Cunningham.

If the court please, may I pass Exhibit 4 to the jury?

(Testimony of Ralph W. Becker.)

Mr. Christensen: I think, your Honor, it might be well that that be reserved until the case is submitted, because there may be motions to strike. I have a motion that I shall make to certain phases of it, and I can't see any purpose at [46] this time, there are going to be so few exhibits, that it need go to the jury now in its entire form. There are those aspects that your Honor indicated might not be appropriate.

Mr. Tolin: I don't see any of those things written on this Exhibit 4, and it is in evidence. I think the jury is entitled to see it and learn the case as it goes along. The witness has testified fully concerning the exhibit.

Mr. Christensen: It is as to the extraneous and irrelevant matter that couldn't conceivably lend any aid at all to the character of the charge that we are confronted with here that I am directing myself to.

Mr. Tolin: If counsel will indicate what he considers extraneous matter that you would like covered, I am agreeable to having it covered up by the clerk.

Mr. Christensen: Very well. I will stand on my original proposition, that it is a sort of a piecemeal matter of passing an exhibit, because you don't get the full import or significance of an exhibit, and they can be integrated when they are all offered at one time.

The Court: They are introduced piecemeal.

(Testimony of Ralph W. Becker.)

Mr. Christensen: Sometimes the practice is to do it the other way, your Honor.

The Court: The jury may see this one.

Mr. Christensen: Very well, your Honor.

Mr. Tolin: I call Officer Cunningham. [47]

Witness Becker: Can I be excused?

The Court: Yes.

Mr. Tolin: I offer No. 5 in evidence.

Mr. Christensen: That is objected to, if your Honor please, as hearsay, and it fits the absolute pattern of the Prevos case in our own circuit on this kind of a document, and it was held in that case to be prejudicial error. There is no testimony at all that anything contained on that came from the lips of this defendant. Simply that it is a record that somebody wrote up based, in part at least, on the other exhibit. The only testimony is that down to a point of the signature line the previous witness Siu said that that was his signature, and the detail before that contains simply the charge, suspicion of bookmaking, the address, and the agency arresting him; then a title D. S. in the corner and a signature. Beyond that, the other witness Siu testified he had nothing to do with, and it is conclusions only in the latter portion of that exhibit.

Mr. Tolin: I am agreeable to arguing it at a later time.

Mr. Christensen: It isn't a case of arguing. It is a case of a prejudicial piece of evidence getting

in, and I say it is hearsay, and I object to it on that ground I recite, your Honor, the case of United States vs. Prevos.

The Court: We won't take time now. I will reserve ruling [48] on it. Go ahead.

Mr. Tolin: Mr. Cunningham.

FRANK H. CUNNINGHAM

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Frank H. Cunningham.

Mr. Tolin: We are going to bring in a better copy of Exhibit No. 9 for identification. Here it is. May it be substituted in lieu of the other?

Direct Examination

By Mr. Tolin:

Q. Mr. Cunningham, what is your occupation?

A. Police Officer of the City of Los Angeles.

Q. How long have you been so employed?

A. 12½ years.

Q. Are you attached to any particular detail or duty? A. I am.

Q. What is it?

A. Record and Identification Division.

Q. How long have you been attached to that detail?

A. The past two and a half years.

Q. Do you hold any particular position in that work? A. Assistant commander.

(Testimony of Frank H. Cunningham.)

Q. Are the records kept under your directions?

A. They are.

Q. You have before you Exhibit 9 for identification. What is that?

A. That is a photocopy of our form 5.5, the identification report.

Q. For what purpose is that identification report used in the work of your department?

A. As an adjunct to our fingerprint card furnishing additional information so that we can in the future identify a person. The information is indexed in various forms, the name, physical defects are indexed, and it is kept in the package and serves to identify the individual arrested connected with the Los Angeles number, which is the overall number of the subject.

Q. That Exhibit 9 that you are holding is a photostat. Did you prepare that photostat yourself?

A. I did.

Q. From what did you prepare it?

A. From the original of the 5.5.

Q. Which was a record of your office?

A. That's right.

Q. Was that record required to be kept in the usual and ordinary course of the business of the Police Department?

A. It was.

Q. Acted upon by the Police Department in its work? [50]

A. That's right.

Q. Was that record available to any other law enforcement agencies than the Los Angeles Police

(Testimony of Frank H. Cunningham.)

Department? A. Yes.

Mr. Christensen: I object to that. It is irrelevant and immaterial, your Honor.

The Court: I think he may answer.

The Witness: Our records are open to all bona fide law enforcement agencies.

Q. (By Mr. Tolin): Would that include the Immigration and Naturalization Service of the United States? A. Yes, sir, it does.

Q. Do you recognize that as a true photostat of the original? A. Yes, sir, I do.

Mr. Tolin: I offer it in evidence as Government's Exhibit 9.

Mr. Christensen: That, if your Honor please, is objected to, again, upon the ground that it is hearsay. Also, it is irrelevant and immaterial. The same objections as to the previous exhibit, No. 5.

Mr. Tolin: I will lay a further foundation, then, as to the signature, Mr. Christensen. Withdraw the offer at this time. You may cross-examine.

Mr. Christensen: I didn't see any signature on this at [51] all. It may be on the better copy. I see some handwriting down at the bottom now.

Mr. Tolin: On the good copy it shows right here (indicating).

May I pass the proposed exhibit to Mr. Christensen? He has a bad copy here.

If the court please, we are discussing here the

(Testimony of Frank H. Cunningham.)

appropriateness of covering certain portions of this exhibit.

You may cross-examine, Mr. Christensen.

Mr. Christensen: No cross-examination, your Honor.

The Court: All right. That is all.

Mr. Tolin: Mr. Harper.

ORVILLE E. HARPER

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Orville E. Harper.

Direct Examination

By Mr. Tolin:

Q. Mr. Harper, you are a police officer of the City of Los Angeles?

A. Not now, I am not.

Q. Were you such on the first day of November 1945? A. Yes, sir, I was.

Q. I show you Exhibit 9, which purports to be an identification [52] report.

Mr. Christensen: That is for identification, Mr. Tolin?

Mr. Tolin: Yes, Exhibit 9 for identification.

Q. And I show you also what I will ask be marked for identification as the next in order.

The Clerk: Exhibit 11, for identification.

(Testimony of Orville E. Harper.)

(The document referred to was marked Government's Exhibit No. 11 for identification.)

Mr. Christensen: Can I see it, please?

Mr. Tolin: Yes.

(Document handed to counsel.)

Q. (By Mr. Tolin): Looking at Exhibit 9, Mr. Harper, do you recall whether you had anything to do with the arrest of the subject that is mentioned thereon? A. Yes, sir.

Q. Did you make that arrest?

A. No, sir, I did not.

Q. What was your part in it? Were you a booking officer, or what?

A. Yes, sir, booking officer.

Q. Do you know Allen Smiley, seated here at counsel table?

A. I have saw him. I don't know him.

Q. Do you recall him as a man that you saw at some time that you had something to do with that Exhibit 9 for [53] identification?

A. Yes, sir, I do.

Q. When and where?

A. At the Lincoln Heights Jail.

Q. In Los Angeles? A. Yes. [54]

Q. When?

A. November 1st, approximately 3:00 o'clock in the morning, 1945.

Q. Mr. Harper, some of the jurors are having trouble hearing you.

(Testimony of Orville E. Harper.)

A. It was November 1st, 1945, at approximately 3:00 o'clock in the morning of that day.

Q. Now, at that time who was present besides the defendant Smiley?

A. Well, there was a number of them present. They booked a bunch of them on a gambling charge.

Q. Were there other officers present?

A. Yes, sir, there was.

Q. Did you prepare this Exhibit 9 or some part of it? A. Part of it, yes, sir.

Q. Do you recall what part you prepared?

A. The information that is on it.

Q. Where did you get the information that you inserted on it?

A. From the defendant when he was booked—at the time he was booked.

Q. Was he afterwards shown that Exhibit 9, and of course Exhibit 9 is a photostat, but was he shown the original of it?

A. Well, I don't know that part of it.

Q. Well, will you look at it? You will see there is [55] what appears to be a signature of Allen Smiley on it. Did this defendant sign that?

A. I couldn't say myself. I don't remember. It has been so long ago.

Q. Were you in charge of the booking operations at that time? A. No, sir, I was not.

Q. What was your part in it?

A. I was just the booking officer.

Q. What was the practice in the department as

(Testimony of Orville E. Harper.)

to the preparation of these identification statement?

A. Well, they asked the prisoner booked at the time he was booked the information that covers this and put it down just as it was told to them at the time from the person that was being booked.

Q. And was the prisoner then shown the document?

A. He has to sign it after it is made out.

Q. He was asked to sign it?

A. Yes, they all are.

Q. Do you have any recollection as to whether that was done in this particular case?

A. Well, I can't say in this particular case. It is the practice that they all do.

Q. You mean to say you have no independent recollection of it in this instance? [56]

A. No; I don't have any of them for that matter.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Christensen:

Q. Mr. Harper, at the time of this booking that you have just referred to, how many other persons were there at that time?

A. I don't recall. Quite a number. Somewhere around 20 persons altogether.

Q. And am I to understand that you were the officer who booked all of these 20?

A. No, sir; only part of them.

Q. How many? A. Five, I think.

(Testimony of Orville E. Harper.)

Q. And where was it you booked them?

A. In the booking office at Lincoln Heights Jail, at the city jail, Los Angeles.

Q. And the whole 20 were in that booking office at that time? A. Yes, sir, they were.

Q. And you were then the booking officer on duty at Lincoln Heights? A. Yes, sir.

Q. Were there any other booking officers on duty at that time? [57]

A. Yes, sir, there were.

Q. Who were the other officers?

A. I don't recall their names, but there are always three of us present at the time.

Q. That is a pretty busy station, isn't it, Lincoln Heights? A. Very busy.

Q. Very busy? A. Yes.

Q. So busy that it requires three booking officers on each shift?

A. There are usually on each shift.

Q. Usually? A. (No answer.)

Q. And can you give us the names of any of the other five that you booked at that time?

A. No, sir, I can't.

Q. As a matter of fact, you don't even remember Mr. Smiley as being there at that time, do you?

A. Yes, I remember him.

Q. You remember him, do you? A. Yes.

Q. Did you ever see him before?

A. I seen his pictures before—not him.

Q. And were all 20 standing together at the

(Testimony of Orville E. Harper.)

counter [58] where you three booking officers were making the bookings?

A. No, sir. I don't recall how they were standing or anything.

Q. Pardon me?

A. I don't recall how they were standing or where they were standing, but there was approximately 20 persons in the booking office at the time, including officers.

Q. And did you type these yourselves?

A. These?

Q. Yes. A. Only the information.

Q. That is what I mean. You type the information? A. Yes.

Q. You have no independent recollection now, do you, of asking these questions and then these answers being given to you?

A. Well, not question for question, no, sir, I don't recall, but it is the practice that we have to do exactly what the person tells us.

Q. You have a practice of when somebody is brought in on a charge that you must make out an identification slip and that is called booking?

A. Yes.

Q. And you put a sheet in the typewriter and either you or somebody else asks the questions and you immediately [59] transmit that information to a piece of paper, is that right? A. Right.

Q. Do you recall in this instance whether you

(Testimony of Orville E. Harper.)

even asked Mr. Smiley or somebody else asked him the question at that time?

A. Well, it had to be me. No one else asks the questions. You ask them direct from the person being booked.

Q. Now, you have testified as to practice and that this is required by the police department, this identification report. What is your practice in the instance of a recalcitrant prisoner who refuses to answer these questions?

Mr. Tolin: Objected to as irrelevant.

Mr. Christensen: Your Honor, we have an element of duress that can be developed in this case.

The Court: Objection will be sustained.

Mr. Christensen: Well, may I reserve that and make an offer of proof later on, your Honor, out of the presence of the jury?

The Court: Yes.

Mr. Tolin: We will keep Mr. Harper available if you want to use him as your witness.

Mr. Christensen: Well, this is cross-examination. No further questions, your Honor.

Mr. Tolin: Have you given this an exhibit number?

The Clerk: Plaintiff's Exhibit 12 for identification. [60]

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Redirect Examination

By Mr. Tolin:

(Testimony of Orville E. Harper.)

Q. Mr. Harper, you are not with the Los Angeles Police Department now? A. No, sir.

Q. And it has been some time since you have had occasion to see or work with these records, is it not? A. Some time, yes, sir.

Q. Mr. Harper, I show you Exhibit 12 for identification. Do you recognize the handwriting on that document? A. Yes, sir, I do.

Q. Whose handwriting is it?

A. It is my handwriting.

Q. Where did you get the information that you wrote out on Exhibit 12 for identification?

A. From the defendant Allen Smiley.

Q. There appears to be a question on here respecting birth and the answer is printed "Born in," and then the words written in "N. Y." Who gave you that information? A. Allen Smiley.

Q. Did you ask him for it?

A. Yes, sir, I did.

Q. Do you recall how you asked him? [61]

A. I asked him where he was born.

Q. And what did he answer?

A. New York.

Q. Now, does this refresh your recollection as to how the questions were asked and what questions were asked with respect to the preparation of Exhibit 9 for identification? A. Yes.

Q. And with your memory so refreshed can you now tell us how you got the answers that are typed

(Testimony of Orville E. Harper.)

in response to the printed questions upon Exhibit 9?

A. One was copied and the other was asked.

Mr. Christensen: I can't hear you.

The Witness: Some of it was copied from the booking slip and part of it was asked the individual.

Q. (By Mr. Tolin): You say part of it was copied from the booking slip and part of it was asked?

A. Yes, sir.

Q. Asked of whom? A. Allen Smiley.

Q. Now, directing your attention to that part of it which says "citizen," which is a printed word, and after the word "yes." Was that copied from something or was that asked?

A. That was asked.

Q. Asked of whom? [62]

A. Allen Smiley.

Q. By whom? A. By myself.

Q. And how did he answer that question?

A. "Yes."

Q. Directing your attention to that portion of Exhibit 9 for identification which refers to the age 38. Was that copied or was it asked?

A. Asked.

Q. Asked of whom? A. Allen Smiley.

Q. By you? A. Yes, sir.

Q. And was the answer "age 38" given by him?

A. Yes, sir.

Q. Referring to the printed question "time in country" and the typewritten answer "20 years," was that copied from something or was that asked?

A. That was asked too.

(Testimony of Orville E. Harper.)

Q. By whom? A. By me.

Q. Of whom? A. Allen Smiley.

Q. And who answered it?

A. Allen Smiley. [63]

Q. Is that the answer he gave you?

A. Yes, sir.

Q. Referring to that portion of Exhibit 9 for identification which is printed, the word "state" and the typed answer "20 years," was that asked or copied? A. That was asked.

Q. Asked of whom? A. Allen Smiley.

Q. By you? A. By me.

Q. And who answered? A. Allen Smiley.

Q. And where the printed portion is "U. S. A." and the typed portion "38 years," was that asked or copied? A. That was asked.

Q. Of whom? A. Allen Smiley.

Q. By you? A. By me.

Q. And who gave that answer?

A. Allen Smiley.

Q. Now, can you tell us what portion of this Exhibit 9 for identification was copied?

A. Yes, sir, I can.

Q. Will you tell us, please? [64]

A. The booking number in the right-hand corner at the top, the charge and the name and the address.

Q. There are two addresses. There is the address of the defendant and the location of the arrest. To which one are you referring?

(Testimony of Orville E. Harper.)

A. Location of arrest.

Q. The location of arrest was copied?

A. Yes.

Q. Does that constitute the portion that was copied?

A. Well, it looks like about all of it, yes, sir.

Q. Now, since we have gone over this more fully and you have had Exhibit 12 for identification before you, I will ask you is that your signature on there.

A. Yes, sir.

Q. Harper? A. Yes, it is.

Q. Do you now recall whether or not you saw the defendant Smiley sign that, meaning Exhibit 9 for identification?

A. I don't recall that part of it, of him signing it.

Q. So you don't know whether this is a real signature or a spurious signature?

A. I don't recall him signing it.

Q. It wasn't the custom, was it, to have other people sign for these men? [65]

A. No, sir, it wasn't.

Q. It was not? A. No.

Mr. Tolin: Do you want to recross?

Mr. Christensen: Well, I have a couple more questions.

Recross-Examination

By Mr. Christensen

Q. Now, as I understand it, Mr. Harper, on this Exhibit 9 you don't recall Mr. Smiley signing that in your presence?

A. No, sir, I don't recall that part of it.

(Testimony of Orville E. Harper.)

Q. But you are testifying that you do recall in his presence that you asked the questions appearing upon that exhibit? A. Yes, sir, I do.

Q. That you now have an independent recollection of it? A. I do. [66]

Q. You said something about this Exhibit 9 was required in the course of practice by the Police Department. Did somebody instruct you to make these bookings in this fashion?

A. No, sir. It isn't a practice, it is an order, departmental order.

Q. In other words, there is a department order saying that you should get these or try to get these from anyone who is arrested? A. Correct.

Q. So you are simply carrying out an order to try to get as much identification information as a prisoner will give you? A. Correct.

Q. Oftentimes they don't give you any?

A. Well, if he doesn't, he is held up until he does.

Mr. Christensen: That is all.

Redirect Examination

By Mr. Tolin:

Q. But if he does, you write it down, is that right? A. Yes.

Q. If he refuses to give you any, what kind of entry do you make?

A. If he refused to give any, we book him as John Doe, give him a booking number, and hold him until he does give the information. [67]

(Testimony of Orville E. Harper.)

Mr. Tolin: I couldn't hear the last part of it. May the reporter read it, please?

(The last answer was read by the reporter.)

Mr. Tolin: That is all.

Recross-Examination

By Mr. Christensen:

Q. By "holding him," you mean you put him in a cell, don't you? A. We usually do.

Mr. Christensen: That is all.

Further Redirect Examination

By Mr. Tolin:

Q. Suppose he makes bail, he would go out on bail, wouldn't he?

A. I can't explain that part of it.

Mr. Tolin: That is all.

Further Recross-Examination

By Mr. Christensen

Q. Bail isn't set, isn't that a fact, until after he is booked?

A. I don't know anything about that part.

Mr. Christensen: That is all.

Mr. Tolin: Mr. Christensen, when we were talking about a possible stipulation on that Exhibit 9, I had used some exemplars of handwriting. Here is Exhibit 1 and Exhibit 2, [68] and Mr. Myer used that in arriving at his opinion.

If you can't give us an answer this afternoon, we would like to know to line up the witnesses.

Mr. Christensen: To save time, I will stipulate to this: If Mr. Myer is called, he will testify with

(Testimony of Orville E. Harper.)

reference to the signature on Exhibit 1 that is the signature of Allen Smiley made in his presence.

Mr. Tolin: No. That takes further foundation. Mr. Dunn will have to testify to this signature being made in his presence.

Mr. Christensen: What is it you are going to call Mr. Myer for?

Mr. Tolin: I am going to call Mr. Myer to testify that he has examined Exhibit 1 with respect to the true signature of Mr. Smiley.

Mr. Christensen: I will then stipulate that Mr. Myer will testify, upon a comparison of Exhibit 1 and Exhibit 9, that the names——

Mr. Tolin And Exhibit 2.

Mr. Christensen: And Exhibit 2, that the names “Allen Smiley” written on those are one and the same.

Mr. Tolin: Were written by the same person.

Mr. Christensen: One and the same, written by the same person.

Mr. Tolin: And that Don Myer would further testify that [69] his occupation is that of an examiner of questioned documents——

Mr. Christensen: I will stipulate to his qualifications.

Mr. Tolin: As a handwriting expert?

Mr. Christensen: Right.

Mr. Tolin: Then I will offer Exhibit 9 in evidence.

Mr. Christensen There will be an objection to

(Testimony of Orville E. Harper.)

it as irrelevant and immaterial to the issues in this case.

Mr. Tolin: Yes, Mr. Christensen, we are overlooking, also, that I agreed to stipulate that Mr. Smiley, this defendant, was tried on the charge that is referred to in Exhibit 9, and that the jury found him not guilty.

Mr. Christensen: Correct, so stipulated.

The Court: It may be received.

Mr. Christensen: I have the objection, your Honor, and it will be overruled?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 9 and was received in evidence.)

Mr. Tolin: May I pass it to the jury?

I will call Mr. Cox.

My attention is called to the fact that Exhibits I and 2, which were heretofore for identification, were not offered in evidence. I offer them in evidence at this time.

Mr. Christensen: I haven't seen these, your Honor. [70]

Why don't you withhold these until the morning and go on with the witness now?

Mr. Tolin All right.

(Witness excused.)

THOMAS ALBERT COX

called as a witness by and on behalf of the plaintiff,

(Testimony of Thomas Albert Cox.)

having been first duly sworn, was examined and testified as follows:

The Clerk: Your full names, please.

The Witness: Thomas Albert Cox.

Direct Examination

By Mr. Tolin:

Q. Mr. Cox, what is your occupation?

A. Manager of an escrow department.

Q. By whom are you employed?

A. Security Bank, Adams-Crenshaw Branch.

Q. That is the Security-First National of Los Angeles?

A. Yes, it is.

Q. Mr. Cox, we have been having a little difficulty with people hearing in this room. This air-conditioner back here makes it very difficult, and the architect, unfortunately, put the jury box in the dead spot as far as hearing is concerned, so we will have to ask you to speak up.

Were you at one time connected with the Beverly Hills Police Department?

A. Yes, I was.

Q. Were you employed there during the year 1947?

A. Yes.

Q. What was your occupation there with the Police Department?

A. Desk clerk? I suppose you would call it something like desk clerk.

Q. Desk clerk?

A. Yes.

Q. Did you have anything to do with the identification records of prisoners?

A. Yes, I was one of the fellows who kept all

(Testimony of Thomas Albert Cox.)

of the identification records together, and also was used for booking.

Q. When a man would be brought into the police station in custody, what was the method by which the arrest report and identification papers were prepared? That is, those papers which showed his address and the various elements of identification, such as color of eyes, and so on.

A. Well, perhaps if I could see an arrest report to refresh my memory.

Q. I have a photostat of one here. Will that help you? It is the one I was using myself with respect to this inquiry.

Mr. Neeb: May we see that, Mr. Tolin?

Q. (By Mr. Tolin): May I have that one, and I will pass it to counsel, and I will show you Exhibit 7, for identification. Now, can you tell us what the procedure is that is [72] followed in getting the information to enter on a document such as that document, Exhibit 7, for identification?

A. The person arrested, or the person brought in for booking, would be brought to the booking counter, and the desk clerk, or whoever is on duty at the time, would ask questions in following this arrest report; ask for their names, addresses, and so on and so forth; and we just fill them in as to their answers.

Q. What do you mean, "we fill them in as to their answers"? Who are "we" and who are "they"?

(Testimony of Thomas Albert Cox.)

A. In this particular arrest report—these arrest reports have places for the name of the person arrested, his address, occupation, and so on. We would ask the person arrested what their name was and fill in the answer, and what their occupation was, and so on; as we ask these questions we would fill in on the arrest report their answers.

Q. Did you ever have occasion to ask the defendant, Allen Smiley, questions so that you could fill in answers on an arrest report? A. Yes, I did.

Q. And when was that?

A. That was in June or July of 1947.

Q. What was the occasion?

Mr. Christensen: Just a moment. “What was the occasion” is irrelevant and immaterial. What did he do at the time he [73] was asking the questions and was booking, that is what we are interested in.

The Court: I think so.

Q. (By Mr. Tolin): Was he a person that was in custody of the Beverly Hills Police Department at that time? A. Yes, he was.

Mr. Tolin: Mr. Christensen, I know what you have in mind, and I don’t want—

Mr. Christensen: I don’t want to get into collateral issues.

Mr. Tolin: Neither do I. And I will stipulate that he was never convicted of any charge in connection with that arrest.

Mr. Christensen: He was never even charged.

(Testimony of Thomas Albert Cox.)

Mr. Tolin: I will stipulate to that. There had been a murder, and he was a person that was near, and he was questioned along with other people.

Mr. Christensen: Yes, because he was there at the time and was also shot.

Mr. Tolin: I didn't get that.

Mr. Christensen: He happened to be there and he also was shot.

Mr. Tolin: This defendant was shot?

Mr. Christensen: Yes. They have got the coat out there where the bullets went through. And we are getting into [74] collaterals.

Mr. Tolin: Perhaps we had better stay out of the collaterals.

Mr. Christensen: I think so, too.

Q. (By Mr. Tolin): I will ask you, then, Mr. Cox, did you ask the defendant Smiley any questions at that time? A. Yes.

Q. And did he give certain answers?

A. Yes, he did.

Mr. Christensen: If it will shorten the matter on this, as to the questions that were asked with reference to residence, birth, and that are germane to this issue, I will have no objection to that phase of it going into the record, subject only to an objection that it is irrelevant and immaterial.

Mr. Tolin: Shall I read the portions that I deem relevant? I will point them out to you first, so that you can call me.

“Person Arrested. Smiley, Allan.

(Testimony of Thomas Albert Cox.)

“Residence Address. 1220 Sunset Plaza Dr., Los Angeles, Calif. Phone. Cr. 19145.”

The date, 6/21/47. That appears to be the date of the report.

Mr. Christensen: That’s right.

Mr. Tolin: Question: “Hair. Grey. Eyes. Blue. Height. 5/11. Weight. 170. Age. 39. Complexion. Ruddy. [75] Build. Medium.

“Descent. Jewish. Nationality. American.

“Where Born. New York, New York. Date Born. 1/10/08.

“Time in County. 20 Yrs. State. 20 Yrs. U.S.A. Life.

“Occupation. Hotel Owner (part interest).”

Arrested by Captain White, Sergeant Alcorn.

Mr. Christensen: That, of course, wasn’t his answer. That was simply a detail.

Mr. Tolin: That’s right. That last, arrested by Captain White, Sergeant Alcorn, is an entry which is not claimed to be a question put to the defendant or answered by him.

The date is an entry upon it, but not intended to be a question asked of this defendant or answered by him.

The other matters, I understand, it is stipulated were questions asked of the defendant by this witness Cox and answered by the defendant to Cox as appears within the language of this stipulation?

Mr. Christensen: Yes, and received subject to the motion that it is irrelevant and immaterial.

(Testimony of Thomas Albert Cox.)

The Court: It may be received.

Mr. Tolin: We don't need the exhibit. We have the stipulation.

The Court: Is that all from this witness?

Mr. Tolin: Yes.

The Court: You are excused.

(Witness excused.) [76]

Court will stand at recess until 10:00 in the morning.

Keep in mind the court's admonition.

Mr. Christensen: 10:00 o'clock?

The Court: Yes, 10:00 o'clock.

(Thereupon, at 4:15 o'clock p.m., an adjournment was taken until Wednesday, July 13, 1945, at 10:00 o'clock a.m.) [77]

Wednesday, July 13, 1949, 10:00 A.M.

The Court: You may proceed.

Mr. Tolin: If the Court please, I would like to tender at this time government's proposed instructions. There is one set which I first hand to the Clerk, which are the instructions that are particularly applicable to the case. The next which I will now hand him is a request for general instructions.

We have quite commonly been requesting general instructions by number, and the number refers to the standard instructions of a general nature which have been given by Judge Mathes, of which

there are mimeographed copies in the judge's chambers. If you don't have them, Mr. Christensen—I think most of the bar have—I will supply you with them.

Mr. Christensen: No, I haven't. I think mine follow partially Judges Mathes, Judge Hall, and Judge McCormick.

Mr. Tolin: Judge Mathes' follow very largely the Judges James instructions.

The Court: I have had a copy of Judge James' instructions for 12 years, and those are the ones I use here and in Arizona.

Mr. Christensen: They are competent and excellent and a comprehensive set.

The Court: Yes. [81]

Mr. Tolin: We are satisfied with Judge James' instructions. And then the instructions that must be drawn for any particular case are separately bound in the group that I have just submitted to the court.

Shall I proceed with the evidence?

The Court: You may.

Mr. Tolin: I have sent to the witness room.

MILTON S. HOPKINS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Milton S. Hopkins.

(Testimony of Milton S. Hopkins.)

Direct Examination

By Mr. Tolin:

Q. Mr. Hopkins, what is your occupation?

A. I am retired deputy sheriff, senior clerk, from the Los Angeles County Sheriff's department.

Q. Were you on active duty in the Sheriff's department during the year 1944?

A. Yes, sir, I was.

Q. What kind of work were you doing there at that time?

A. I was senior clerk in charge of the department on that shift, and I booked prisoners part of the time.

Q. Did you have occasion to book the prisoner Allen Smiley? [82]

A. Yes, sir, I did.

Q. Do you see him here in the courtroom?

A. Yes, sir.

Q. Which person is he? A. Pardon?

Q. Which man is he?

A. The last man at the table sitting there (indicating).

Q. You indicate the gray-haired man at the end of the defense table? A. Yes, sir.

Q. What did you do when you took some part in the booking of that prisoner at that time?

A. The first thing when he was brought in, I filled out the upper part of the booking slip so that the arresting officer could put on his signature, and then he could go.

(Testimony of Milton S. Hopkins.)

Q. Did Mr. Siu bring the prisoner to you?

A. Yes, sir, he did.

Q. And then, after you had filled in the first part of the booking record, Mr. Siu went away, is that your testimony? A. Yes, sir.

Q. After that did you talk to the prisoner?

A. Yes, sir, when we started booking them, I booked this prisoner.

Q. You have before you Exhibit 5 for identification, and you are holding it in your hand; will you look at it and [83] see if there is some part of that that you filled in while the prisoner Smiley was there in your presence?

A. I filled in all of that while he was there.

Q. Did you ask him any questions before you filled in any part of that?

A. We asked him each and every question for each compartment on each line, and fill in the information that the prisoner gives to us at that time.

Q. There appears upon Exhibit 5, for identification, the printed words "Birthplace City State," and then the typewritten words "New York, N. Y."; who put that on Exhibit 5, for identification?

A. I put that on there.

Q. Where did you get that information?

A. We get that information from the answer the prisoner gives to us when we ask the question, "Where were you born?"

Q. And then there appears the printed word

(Testimony of Milton S. Hopkins.)

“Age” and the typewritten figures “37”; did you put that on there? A. I did.

Q. Where did you get that information?

A. By asking the prisoner, as we always do.

Q. Then there appears down a little farther, “Lived in City County State,” and it is typewritten after those printed words, “17 years”; did you put that typewritten portion on there? [84]

A. Yes, sir, I did.

Q. And from whom did you get that information? A. From the prisoner himself.

Q. By “the prisoner,” whom do you mean?

A. I mean Allen Smiley.

Q. Is that true, also, of the next answer in the line, that is to say, the question, “U. S. Citizen,” and the answer, “Yes”^a

A. That is correct. During the last 15 years of so that I was booking prisoners there, I asked that question of each prisoner deliberately and positively, because I helped a neighbor get citizenship, and I knew a man who was American, went to Canada, renounced his citizenship, and later on he came back thereafter——

Mr. Christensen: Just a moment, Mr. Witness. I think that is not responsive, and I move to strike out the latter portion of his answer.

The Court: It may be stricken.

Q. (By Mr. Tolin): What did you do with that Exhibit 5, for identification, after you had filled in those things?

(Testimony of Milton S. Hopkins.)

A. Then we have a prisoner sign the booking slip.

Q. I didn't note his signature on that one.

A. It is on the lower half.

Q. Will you show me where it is?

A. No. This is the upper half. This is torn off, you see. One part goes to the prisoner, one part goes to various different places, the department of property, the original part goes one place, and different parts of the slip go different places.

Q. What was the nature of the part that was torn off and given to him?

Mr. Christensen: Just a moment. That is not the best——

The Witness: The part——

Mr. Christensen: Just a moment, Mr. Witness. When I am talking you are not supposed to continue.

I suggest that is not the best evidence. Let's have whatever it is he is talking about.

Mr. Tolin: I am not asking him for the text of it; I am just asking him the nature of it.

The Court: Was it a duplicate of what you have in your hand?

The Witness: It was the original signed, and this is——

The Court: No. I say, was it a duplicate of what you have in your hand?

The Witness: No. Just the bottom half.

Mr. Tolin: May I ask another question?

(Testimony of Milton S. Hopkins.)

Q. (By Mr. Tolin): Is it a matter on a different subject entirely than what appears upon the part that you now hold in your hand?

A. Yes, it covers the property only. [86]

Q. And was that given to Mr. Smiley in this case?

A. Yes. The yellow slip was, yes, sir.

Q. The part that was below this that now constitutes Exhibit 5?

A. Yes.

Q. Did he at any time during his conversations with you at that time, either in the presence of J. E. Siu, the other deputy, or after Mr. Siu had left, say anything to you about his being or having been a citizen of any nation other than the United States?

A. No, sir.

Mr. Tolin: I have completed the direct examination.

Cross-Examination

By Mr. Christensen:

Q. You say you have been doing this work for the sheriff's office for about 15 years, booking prisoners in the county jail?

A. I have been 28 years.

Q. And so in the course of that period of time you have booked thousands of prisoners?

A. Many thousands of prisoners.

Q. And you have booked many thousands, as a matter of fact, since the 25th of May, 1944, isn't that right?

A. I booked many since then.

(Testimony of Milton S. Hopkins.)

Q. And met thousands? [87]

A. Well, several thousands since that time.

Q. And you say now that you have an independent recollection that way back on May 25, 1944, you remember actually talking to Mr. Smiley? Answer that question.

A. If there is any doubt as to the identity his fingerprints on the slip you hold in your hand will match the ones he has on his fingers.

Q. I am not asking you that at all. I am asking you whether or not you will now say to this jury that you have an independent recollection that on May 25, 1944, you had a talk with Mr. Smiley and interrogated him and asked him certain questions.

A. If I had——

Q. Now, just a moment——

A. If I had I would not have recognized——

Q. Do you understand the question?

A. I would not have recognized a man among those thousands, but I know my signature, I know my booking and his fingerprints will connect him with the prisoner there.

Q. Then, as a matter of fact, as you sit on the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?

A. I recognize him because of the fact that at the other time, the other man was booked, Mr. George

(Testimony of Milton S. Hopkins.)

Murray wanted to book the other man because of the greater publicity and I booked him.

Q. Well, now, will you read the question, Mr. Reporter.

(Question read as follows:

“Q. Then, as a matter of fact, as you sit on the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?”)

Q. (By Mr. Christensen): Will you answer that yes or no? A. Will you read it again?

(Question reread.)

Q. Can you answer that question?

A. I remember booking him because of George Murray booking Bugsy Siegel next to him.

Q. Will you answer the question?

Mr. Tolin: He is answering it.

Mr. Christensen: He says recalls booking him but that is not my question, your Honor.

The Court: All right, reread the question.

(Question read as follows:

“Q. Then, as a matter of fact, as you sit on [89] the witness stand now you do not have any personal independent recollection that you asked the questions that you testified to here and that he gave those answers and you only say he did that because it is a matter of your practice?”)

(Testimony of Milton S. Hopkins.)

The Witness: No, but I do remember booking him because all of the photographers and the rest of us were there.

Q. (By Mr. Christensen): Then I will ask you this question: So, as you sit on this witness stand you now say that you have an independent recollection that you asked the specific questions appearing on Plaintiff's Exhibit 5 for identification and also that you remember that he gave the particular answers that are written on that particular exhibit?

A. I do remember that I asked those questions and I put down the answers that was given to me.

Q. Then you remember that instance in the many thousands of instances that you have had?

A. Only a few of them stand out and those are those that had the greatest publicity at the time. I was going to start booking Bugsy Siegel but George Murray wanted to book him first because of the publicity there.

Q. Just a moment. I move to strike out the voluntary statements of this witness, your Honor, as not responsive.

The Court: He is stating the reason why remembers.

Q. (By Mr. Christensen): Well, let me ask you if you [90] have ever seen this Exhibit 4 before.

A. Which one is Exhibit 4?

Q. Right here. I am showing it to you.

A. (No answer.)

Q. You have seen that before, have you not?

(Testimony of Milton S. Hopkins.)

A. Yes, I have seen this before. [91]

Q. Did you see that at the time you were booking him?

A. Well, there are so many I have in there I cannot say definitely that I have seen this particular one. I have seen so many but——

Q. On this particular No. 4 you can't have any independent recollection of seeing that?

A. Well, it is very familiar to me but I would not say definitely because there have been so many.

Q. Is it familiar to you because of the fact it is the practice of the arresting officer when he brings the prisoner in to then hand you this preliminary arrest booking slip that he has made?

A. Yes, sir, he does.

Q. And so as a matter of practice you will then say that you saw this at the time Mr. Siegel and Mr. Smiley were before you?

A. In that part I just merely take—have the charge to sign up—sign up for the charge and let the officer go.

Q. I see. So when Mr. Siu brought Mr. Smiley in he at that time handed you Exhibit 4, isn't that correct?

A. It is quite likely that he did.

Q. Isn't it the practice for him to hand it to you? A. It is.

Q. But you have no independent recollection that he did hand it to you? [92]

A. On that particular one, no.

(Testimony of Milton S. Hopkins.)

Q. You don't? A. No, sir.

Q. So when this is handed to you you then have that before you at the time you make out Exhibit 5, is that right?

A. Only the top part. When the officer leaves he takes that with him and we see that no more when we book the prisoner, and the prisoner stands before us when we start it and we do not have that—we have nothing pertaining to that.

Mr. Tolin: May the record show that the witness said, when he said: "We do not have that," he placed his hand on Exhibit 4.

Q. (By Mr. Christensen): Well, what you mean to say is that when the prisoner is brought in, the first thing the officer does is to hand you Exhibit 5, is that right?

A. Not always. He will sometimes take it and lay it beside him and fill out the slip but, in most cases, we slip this in the typewriter and we would have that there or sometimes just the charge. He might hold that in his hand. We might not have—we might not have contact with that at all.

Q. And isn't it also——

Mr. Tolin: May the record show that whenever the witness said——

Mr. Christensen: He was referring to Exhibit 4.

Mr. Tolin: He had Exhibit 4 in his hand.

Mr. Christensen: Yes, Exhibit 4.

(Testimony of Milton S. Hopkins.)

Q. And oftentimes you will take this slip, isn't it true, and put it in your typewriter and have—that is Exhibit 5——

A. We never have that there at the time.

Q. ——and you will have Exhibit 4 before you?

A. No, sir; we never have that when we are booking the prisoner.

Q. You always give it back to him, do you?

A. The arresting officer takes that part and then he sometimes leaves some other things, once in a great while, but we never used that at all for booking the prisoner. We get the information we put there directly from the prisoner by asking him the question.

Q. But when he brings them in the first document you will see will be Exhibit 4, isn't that right?

A. Not always. We may never see that.

Q. I see.

A. The officer may just fill in the charge and where he was arrested and sign his name.

Q. Well, have you any recollection whether you saw Exhibit 4 for identification? A. No, sir.

Q. At all? [94]

A. No, sir, I don't recollect that I did see that.

Q. But you do have a definite recollection that you saw Exhibit 5? A. I do.

Q. That you filled that out and had Mr. Siu sign it and then you asked the questions and the answers were given as below? Do you remember that? A. (No answer.)

(Testimony of Milton S. Hopkins.)

Q. Now then, have you any independent recollection as to the upper portion—we will eliminate the lower portion on Exhibit 5, speaking with reference to the upper portion which contains Mr. Siu's signature. Do you recollect from where you got that information?

A. The officer bringing the prisoner in gives us the charge and where he was arrested.

Q. Does he give it to you orally or off of Exhibit 4 for identification?

A. Sometimes one way and sometimes the other.

Q. Well, do you recall now whether or not you may not have gotten it off of Exhibit 4 for identification?

A. I don't even know if I saw that at all.

Q. You don't know. So in this instance you don't know how you got it?

A. This information—all there is here——

Q. Never mind that. Do you know how you got that [95] information, whether you got it direct from Mr. Siu, the prisoner, or off of Exhibit 4?

A. We never get it from the prisoner. Either got it from Mr. Siu or from the slip and the probability is that——

Mr. Tolin: Does that question refer to the top portion?

Mr. Christensen: That is all. Yes, the top portion of Exhibit 5.

Mr. Tolin: That portion above the signature?

Mr. Christensen: That is right.

(Testimony of Milton S. Hopkins.)

Mr. Tolin: Of Mr. Siu?

Mr. Christensen: That is right.

Mr. Tolin: Have you completed your examination?

Mr. Christensen: Yes, I am through.

Redirect Examination

By Mr. Tolin:

Q. Is this Exhibit 5 for identification a record that is kept by the Sheriff's Office in the regular and ordinary course of its business?

A. Yes, sir.

Q. And acted upon by it in whatever business it has concerning the prisoner?

A. Yes, sir.

Q. And is it required or was it required at the time that you made it out to be preserved and kept as a record?

A. Yes, sir. [96]

Mr. Tolin: Thank you. May this witness be excused?

Mr. Christensen: No, just a question or two.

Recross-Examination

By Mr. Christensen:

Q. When you say "required," from whom did you get instructions to use that particular form?

A. That form has been in use for several years.

Q. It is some form that was developed over there and it was in your office and you used it under directions that you should use it?

A. Yes, sir; it is the customary procedure.

(Testimony of Milton S. Hopkins.)

Q. When you say it was required, you didn't examine or ascertain under the law whether you were entitled to even ask those questions, did you?

A. When the Sheriff's Department operates it operates under the law.

Q. Will you answer my question, please? What was his answer?

(Answer read.)

Mr. Christensen: Will you read the question?

(Question read, as follows:

("Q. When you say it was required, you didn't examine or ascertain under the law whether you were entitled to even ask those questions, did you?")

The Witness: We do. [97]

Q. (By Mr. Christensen): Can you answer that question yes or no. A. We operate by law.

Q. I appreciate that, but that isn't my question. You say it was required so I am asking you a simple question.

Will you please read the question again, Mr. Reporter?

(Question read.)

The Court: Was it required by a superior officer of yours?

The Witness: The Sheriff himself supervised the forming of that form that we use there.

Q. (By Mr. Christensen): In other words, you found a form in your office and you were told to

(Testimony of Milton S. Hopkins.)

use that form in booking prisoners and that is what you did, was use that form?

A. That is correct.

Q. Now, on this particular occasion when Mr. Smiley was brought in were there a lot of persons around at the time in addition to Mr. Siu and Mr. Smiley?

A. There were.

Q. A lot of photographers?

A. Yes, quite a bit of commotion going on.

Q. Quite a number of photographers?

A. (No answer.)

Q. Is that right? [98] A. (No answer.)

Q. I say quite a number of photographers were present at the time?

A. I don't know how many there were but I know there were flashlight bulbs going off in there.

Q. There were more than one?

A. I was under the impression that there were.

Q. A number of newspaper men there?

A. Yes.

Q. For instance, all together, how many were there at the time, in addition to Mr. Siu and Mr. Smiley and those from the Sheriff's office?

A. I do not recall.

Q. Would you say it was five?

A. I wouldn't say.

Q. Ten? A. I would not say.

Q. Twenty? A. I would not say.

Q. Can you give us the names of any of the

(Testimony of Milton S. Hopkins.)

newspaper men or photographers who were there?

A. No, sir.

Mr. Christensen: That is all.

Mr. Tolin: Now may the witness be excused?

The Court: Yes.

Mr. Tolin: Thank you, sir.

(Witness excused.)

Mr. Tolin: I offer in evidence 5, for identification.

The Court: Is there any objection?

Mr. Christensen: Yes, the objection that it is irrelevant [100] and immaterial, your Honor.

The Court: It may be received.

The Clerk: Exhibit 5 marked in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 5 and was received in evidence.)

Mr. Tolin: May I pass it to the jury? And, because counsel for the defendant used No. 4 in his examination respecting it, I would like to pass 4 also.

Mr. Christensen: I think that is in evidence, No. 4?

Mr. Tolin: Yes.

I call Mr. Hood.

RICHARD B. HOOD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Richard B. Hood.)

The Clerk: Your full name, please?

The Witness: Richard B. Hood.

Direct Examination

By Mr. Tolin:

Q. Mr. Hood, what is your occupation?

A. I am special agent in charge of the Los Angeles office of the Federal Bureau of Investigation.

Q. How long have you been so employed?

A. Over nine years.

Q. Were you with the Bureau prior to that time? A. Yes, sir. [101]

Q. Are you familiar with the use that the Federal Bureau of Investigation makes of identification material and information taken from prisoners in various police stations, sheriffs' offices, and the like? A. Generally, yes.

Q. Will you tell us what that use is?

Mr. Christensen: Just a moment, Mr. Hood.

To that, I object, your Honor. It is irrelevant and immaterial, whether they make use of that or they make use of Gallup polls, or what they may do. The question is in this case whether or not he affirmatively made a representation of citizenship that defrauded someone, intentionally, falsely, to someone. They may gather their information from high and wide, your Honor, and that will not show materiality in this case. It must grow out of the very essence of the thing that was being inquired into at that time, and not because of collateral reasons. It is wholly irrelevant and immaterial, your Honor.

(Testimony of Richard B. Hood.)

The Court: He may answer.

The Witness: From the information obtained on criminal fingerprint cards submitted to the Bureau by various law-enforcement agencies, we may from time to time prepare identification orders, we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask it. [102] We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate.

Q. (By Mr. Tolin): Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your Bureau in the way in which you have described?

Mr. Christensen: Just a moment. I make the same objection, your Honor, and also the further objection that it is highly prejudicial.

The Court: It is what?

Mr. Christensen: Highly prejudicial.

The Court: He may answer.

The Witness: It might well be in some instances. It is a pertinent part of the identification record, the same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there.

Q. (By Mr. Tolin): Is there any central place in the United States that you know of where identification material concerning persons suspected

(Testimony of Richard B. Hood.)

of crime, arrestees, and persons prosecuted, is kept?

Mr. Christensen: The same objection, your Honor.

The Court: He may answer.

The Witness: The Bureau maintains those records in Washington, D.C., in its Identification Division. [103]

Q. (By Mr. Tolin): By the "Bureau" do you mean the Federal Bureau of Investigation?

A. Federal Bureau of Investigation.

Q. Is the Immigration and Naturalization Service of the United States a division of the Federal Bureau of Investigation?

A. No. It is a separate department—division of the Department of Justice.

Q. Do you supply the Immigration and Naturalization Service of the United States with information which you receive from—well, in the manner that you have testified to?

A. Those files are available to them at any time.

Q. Do you ever determine, that is, does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service.

A. At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact.

(Testimony of Richard B. Hood.)

Q. By your department?

A. By our department.

Mr. Christensen: Just a moment. May I have the same objection without renewing it?

The Court: Yes. [104]

Mr. Christensen: At this time I will make a motion to strike. Or may it appear as if the objection was made before the answer?

The Court: To all of the testimony of the witness.

Q. (By Mr. Tolin): In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified?

A. Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card.

Mr. Tolin: I have completed the direct examination.

Cross-Examination

By Mr. Christensen:

Q. Mr. Hood, the Immigration Service, that is, the Naturalization and Immigration Service, they likewise keep identification records that are available, then, to your department?

A. Not on just fingerprint cards, sir. That is maintained—the sole one is maintained by the F.B.I. They have their own immigration records.

(Testimony of Richard B. Hood.)

Q. Yes, and those are available to you?

A. Yes, sir.

Q. In other words, in the instance, hypothetically, if you are interested in ascertaining whether there was any [105] proceeding pending against Mr. Smiley, say, in that department, why, then, those records would be available to you?

A. Yes, sir.

Q. And if you were interested in ascertaining whether he was an alien, or not, you could go to those records and see if there was anything there?

A. We would probably check their records, yes, sir.

Q. You would also, would you not, make a check of registrations of aliens, such as indicated by Exhibit 1? Are you familiar with this form?

A. No, sir, I am not.

Q. I thought maybe you were.

A. I haven't seen this particular form. We would check every record possible that we could locate at any source for bearing on the matter.

Q. If you were at all interested from an alien standpoint, you would check your own United States Government records first, wouldn't you?

A. Yes, we would check our own F.B.I. records first, we would start there.

Q. And if you were interested in alienage you would do that with your own Immigration and Naturalization Service department?

(Testimony of Richard B. Hood.)

A. Their law-enforcement agencies, every source that we could contact. [106]

Q. Did you at any time have occasion to ascertain whether or not Mr. Smiley was an alien? Did you ever make such an investigation?

A. Not personally, no, sir.

Q. Was your department ever interested in doing so? A. Yes, sir.

Q. When was that?

A. I do not know the exact date, sir.

Q. Was that back along in '44 and '45?

A. Approximately, yes, sir.

Q. At or about that time did you ascertain from the immigration records that Mr. Smiley had been before the department and had been sworn and testified there as to his being a Canadian citizen, and that he was born in Russia?

A. I personally have no knowledge of it.

Q. I mean your department, did it make such an investigation?

A. I don't know what they found, sir.

Q. And assuming, if they did find that and he at that time under oath testified as to his alienage, of course you wouldn't be interested in any police records when you once obtained those records from that source, from your own official source, isn't that right?

Mr. Tolin: That is objected to as argumentative.

(Testimony of Richard B. Hood.)

The Court: That is purely argumentative. [107]

Mr. Christensen: That is all.

Mr. Tolin: May Mr. Hood be excused?

The Court: Yes.

Mr. Tolin: Thank you, Mr. Hood.

(Witness excused.)

Mr. Tolin: Mr. Cunningham.

FRANK H. CUNNINGHAM

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Further Direct Examination

By Mr. Tolin:

Q. Mr. Cunningham, you were sworn yesterday, but I overlooked one phase of inquiry with you.

You are an executive in the Record and Identification Bureau of the Los Angeles Police Department, is that correct? A. I am.

Q. Are you familiar with the regulations under which that department operates?

A. Reasonably so.

Q. Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States——

Mr. Christensen: Just a moment. That is objected to. [108]

(Testimony of Frank H. Cunningham.)

Q. (By Mr. Tolin): —other than the F.B.I.? I am not interested in that referral.

Mr. Christensen: That is objected to as irrelevant and immaterial and for all the reasons ascribed to the testimony of Mr. Hood.

The Court: He may answer.

The Witness: Yes, we do, Mr. Tolin. If it is brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way, we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact.

Q. (By Mr. Tolin): And you give them that information? A. Yes, we do.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Christensen:

Q. In the instance of Mr. Smiley here, did you advise the Naturalization and Immigration Service, Mr. Pendergast or anyone else?

A. I didn't, no.

Q. Did your department seek any information from that Naturalization and Immigration Service?

A. Concerning Mr. Smiley?

Q. Yes. [109]

A. I have no knowledge of that.

Q. When you talk about information, you will advise the Federal Bureau of Investigation about

(Testimony of Frank H. Cunningham.)

fingerprints, and even the State department, of arrests and the nature of the offense, and so forth?

A. That is automatic, we send our fingerprint cards to Sacramento and Washington.

Q. And along with those cards there will be a lot of detail and information that you may have picked up here, there, and yon, isn't that correct?

A. Only the specific charge for which he was arrested at that time.

Q. In your booking and so forth, you, of course, are interested in a lot of statistical information for purely police purposes, isn't that right?

A. I didn't understand the question.

Mr. Christensen: Read it, please.

(The question was read by the reporter.)

The Witness: That is right, yes.

Q. (By Mr. Christensen): That information that you seek, such as the address and alienage, marriage, or otherwise, is information that hasn't anything to do with the charge itself upon which the prisoner is being held?

Mr. Tolin: Objected to as calling for a conclusion of the witness, calling for his opinion upon thousands of records, [110] and also calling for the opinion of a man in a record and identification department——

Mr. Christensen: I am inclined to think you are right. I will withdraw the question.

That is all.

Mr. Tolin: Just one other question.

(Testimony of Frank H. Cunningham.)

Redirect Examination

By Mr. Tolin:

Q. Was this practice of referral to the Immigration Service enforced during the years 1944, '45, '46, and '47? A. Yes, sir, it was.

Mr. Tolin: Thank you. That is all.

May this witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Tolin: Mr. Dunn.

PERLEY B. DUNN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Perley B. Dunn.

Direct Examination

By Mr. Tolin:

Q. Mr. Dunn, what is your occupation?

A. Investigator of the Immigration and Naturalization [111] Service, Los Angeles.

Q. How long have you been so employed?

A. January 22, 1930.

Q. Do you know the defendant, Allen Smiley?

A. I do, yes.

Q. Did you have occasion to take his fingerprints? A. I did, yes, sir.

(Testimony of Perley B. Dunn.)

Q. I place before you Exhibits 1 and 2, for identification. Let's look at 1 first. I feel we had better look at 2 first.

Mr. Christensen: If you are using them for foundational purposes, we might shorten it. I mean if that is your object.

Mr. Tolin: Yes, it is. I was going to lay the foundation for the introduction of this application for registry as an alien, and the alien registration form into evidence.

Mr. Christensen: Let me see them. I may save you the trouble.

We will stipulate on Exhibit 1, for identification, it contains the signature of the defendant, Allen Smiley.

Mr. Tolin: And may it go into evidence without further foundation?

Mr. Christensen: Aside from foundation, I have some objections to it, but it has nothing to do with the foundation.

Do you want something on this other one?

Mr. Tolin: I want to know whether you are waiving [112] foundation on that.

Mr. Christensen: That is what I thought.

On the second page of the photostat copy of this Exhibit 2, for identification——

Mr. Tolin: You will find I placed some clips there as to the material to which I think you refer.

Mr. Christensen (continuing): ——that the sig-

(Testimony of Perley B. Dunn.)

nature there is that of Mr. Smiley. I will stipulate that that is his signature.

Mr. Tolin: I need more of a stipulation than that. I need a stipulation or we will have to get it through the witness that this document was prepared from information provided the person who typed it by the defendant, Allen Smiley, on the 25th day of October, 1945, and that it then was filed with the Immigration and Naturalization Service of the United States, and everything above the signature of Allen Smiley, that is, that all information above that signature was provided by the defendant, Allen Smiley, to the person who did the typing.

As to page 3, the supplemental sheet, I have no objection, if you don't want the second sheet in, to leaving it out.

Mr. Christensen: I think there is much material on the other that is irrelevant and immaterial and incompetent for the purposes of this proceeding. There may be something in there that may be pertinent, so I will go to the extent of [113] saying that it is his signature that is on that particular page.

Mr. Tolin: I think we are wasting more time than we are gaining.

Mr. Christensen: Apparently so, when you are going beyond the realms of the lawsuit issues.

The Court: We will have our morning recess at

(Testimony of Perley B. Dunn.)

this time. Keep in mind the Court's admonition, ladies and gentlemen.

(A recess was taken.) [114]

The Court: Will you stipulate, gentlemen, the jury are present and in the jury box and the defendant is in court with his counsel?

Mr. Christensen: So stipulated.

Mr. Tolin: So stipulated.

The Court: You may proceed.

Mr. Tolin: Your Honor, it turned out to be a provident recess. Mr. Christensen and I have agreed that the second sheet of Exhibit 2 for identification might be removed from the exhibit and not used.

The Clerk: Exhibit 2 for identification.

Mr. Tolin: And that part 14 shall be covered by the clerk so as not to be apparent—the questions and answers and data there shall not appear.

The Court: Very well.

Mr. Christensen: That is agreeable and with that stipulation I will stipulate that that is the signature and the questions were asked and the answers given.

Mr. Tolin: The questions were asked by Mr. Dunn, an official of the Immigration and Naturalization Service, and the answers were given by the defendant Allen Smiley and he was under oath at that time.

Mr. Christensen: Under oath at that time; yes. It is so stipulated.

(Testimony of Perley B. Dunn.)

Mr. Tolin: And that he was before Mr. Dunn pursuant to [115] a——

Mr. Christensen: Wouldn't that speak for itself?

Mr. Tolin: All right. I will put it in by other proof.

Mr. Christensen: You had one more exhibit you were talking about. I think it is No. 1. We can perhaps dispose of this exhibit.

Mr. Tolin: Mr. Christensen has made certain suggestions concerning Exhibit 1 and to which I am agreeable and they would call for the clerk covering all of page 2 of that exhibit or otherwise obliterating it, and the insert sheet which is headed—that a portion, a certain portion of it can be cut off.

Now, this is an official document of the Immigration Service and we could stick it back on again. Is that all right, Mr. Kidder?

Mr. Kidder: Yes.

Mr. Tolin: The portion beginning “during the last five years,” now immediately above that cut off that page. Then on page 3 the portion beginning—or, I will place a small check mark there and ending where I place the check mark shall be covered. Is that right, Mr. Christensen?

Mr. Christensen: Yes.

Mr. Tolin: Then it is stipulated that the signature of the defendant Smiley is his signature and that it is on a document which he filed with the

(Testimony of Perley B. Dunn.)

Immigration and Naturalization [116] Service of Los Angeles on or about the date which it bears. That is January 20, 1948.

Mr. Christensen: That is correct, your Honor, we so stipulate.

The Court: Very well.

Direct Examination

(Resumed)

By Mr. Tolin:

Q. Mr. Dunn, in your work with the Immigration and Naturalization Service, have you had anything to do with alien registry under that law that was effective at the outset of the late war?

A. Yes.

Q. What was the period of time during which aliens were to have registered under that law?

Mr. Christensen: Just a moment. That is asking him to testify to what the law is.

Mr. Tolin: I will bring the statute in and read it. I thought it was an easy way to get it in. If you object to it I will read the law.

Mr. Christensen: Well, of course, I think that is the better way, whatever the law requires, rather than having a witness interpret the law.

Mr. Tolin: We had been saving so much time I thought you might be willing to save a little more.

Is it stipulated these documents, Exhibits 1 and 2 may [117] go into evidence now?

(Testimony of Perley B. Dunn.)

Mr. Christensen: Subject only to the objection that they are irrelevant and immaterial, your Honor.

The Court: They may be received.

(The documents referred to were marked Plaintiff's Exhibits Nos. 1 and 2 and received in evidence.)

Mr. Christensen: There is no objection to foundation, but as to materiality there is.

Mr. Tolin: All right. Then I have nothing more to ask Mr. Dunn.

Mr. Christensen: I have no questions, obviously.

The Court: You are excused, Mr. Dunn.

Mr. Tolin: As to Exhibit 2, there are several dates stamped on it. I think, Mr. Christensen, we agreed that the date upon which it was executed was October 1, 1945.

Mr. Christensen: That is correct. You might even read the certificate on it into the record—I mean the stamp of the Immigration Service.

Mr. Tolin: "U.S. Immigration and Naturalization Service, October 1, 1945, Los Angeles, California."

Now, Mr. Christensen, concerning Exhibit No. 1 for identification, I understand that you have no objection to it as we have fixed it up here by deleting portions, but since you do have the objection to it upon a certain ground——

Mr. Christensen: I will withdraw the objection to that [118] exhibit.

Mr. Tolin: All right. Call Mr. Hamilton.

PHIL HAMILTON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Phil Hamilton.

Direct Examination

By Mr. Tolin:

Q. Mr. Hamilton, what is your occupation?

A. Immigrant inspector.

Q. Connected with the United States Immigration and Naturalization Service?

A. United States Government.

Q. Stationed where?

A. Los Angeles, California.

Q. Were you so stationed and so employed on October 1, 1945? A. Yes, sir.

Q. Were you present at any time during the preparation of Government's Exhibit No. 2—that is the alien registration form?

A. I took Mr. Smiley over to Mr. Dunn's office, or accompanied Mr. Smiley and his attorney, as I recall, but whether or not I was actually present at the execution of [119] the form I don't have any personal recollection.

Q. What was the purpose of your accompanying him to Mr. Dunn's office?

Mr. Christensen: I object to that, your Honor, as irrelevant and immaterial, what his purpose was.

The Court: The document is in evidence.

(Testimony of Phil Hamilton.)

Mr. Tolin: Yes. I will ask another question.

Q. (By Mr. Tolin): Was Mr. Smiley at liberty or under arrest at the time you took him over there?

Mr. Christensen: That I again object to as irrelevant and immaterial.

The Court: I can't see any purpose of it but you may answer the question.

The Witness: He had immediately before that been placed under arrest by me, under a warrant issued by our central office and as I recall was then waiting for a bondsman to arrive to furnish \$1000 bond.

Q. (By Mr. Tolin): And was that arrest in connection with an immigration or naturalization matter?

Mr. Christensen: That is also objected to as irrelevant and immaterial.

The Court: He may answer.

The Witness: It was in connection with——

Mr. Tolin: I don't care. I just wanted to eliminate, Mr. Christensen, that it was a municipal arrest. I will [120] withdraw the question.

The Court: I said he might answer the question. You might not have heard the ruling.

The Witness: It was in connection with a deportation proceeding being instituted by the United States Government.

Mr. Tolin: You may cross-examine. May I pass Exhibit No. 2 to the jury?

(Testimony of Phil Hamilton.)

The Court: You may.

Mr. Christensen: I believe he answered the last question, did he not, your Honor? [121]

Cross-Examination

By Mr. Christensen:

Q. As an immigration inspector you are authorized, are you not, to conduct hearings on such deportation warrants as you say that you served upon Mr. Smiley, upon which he was released on a thousand-dollar bond? A. Yes, sir.

Q. In other words, you are a hearing officer, are you not? A. Yes, sir.

Q. You call in the alien and you interrogate him?

A. On that occasion I called him in and served a warrant on him.

Q. Yes, but in connection with this particular proceeding you did call him in and conduct a hearing and did interrogate him? A. Yes, sir.

Q. At that time you put him under oath?

A. Not on the occasion of service of the warrant. I informed him of his right of representation. At the subsequent hearing he was placed under oath, the continued hearing, when his attorney was present.

Q. That was an oath to testify truthfully and to answer truthfully any and all questions propounded by you, is that correct? [122]

A. Substantially, yes.

(Testimony of Phil Hamilton.)

Q. And the first hearing following the date of the service of this deportation warrant, which I recall now was October 1, 1945—if I am in error, correct that—you then interrogated him as to his citizenship, did you not? A. Yes, sir.

Q. And under oath on that interrogation he testified, did he not, to the effect that his best recollection was, according to information from his parents, he was born in Russia and brought to Canada as a child?

A. That is correct, yes, sir.

Q. Also that he remained in Canada until he was about 18 or 19 years old when he crossed at Detroit?

A. I was under the impression he was about 15 years.

Q. About 15 years, I believe that is correct, Mr. Hamilton. And he then stated to you that he believed he was a naturalized citizen of Canada because of the naturalization of his father at a time prior to his reaching the age of 15, that is, Mr. Smiley, the defendant here?

A. That's correct.

Q. And you had engaged in a long investigation prior to the serving of this warrant, had you not?

A. No, sir, I had not.

Q. I mean your office.

A. The office had, I believe, yes. [123]

Q. For a period of three, four years?

A. For how long, I wouldn't know. I would

(Testimony of Phil Hamilton.)

say probably a couple of years. Not continuously, but intermittently.

Q. And the testimony he gave you in that respect under oath conformed to the results of your investigation of the previous two years, isn't that correct?

A. I couldn't answer that——

Mr. Tolin: That is objected to as irrelevant and immaterial.

The Court: Yes.

A. (Continuing) ——because we start a hearing de novo.

The Court: Just a moment. I don't think that is material.

Mr. Christensen: That is all.

Mr. Tolin: That is all, Mr. Hamilton.

(Witness excused.)

Mr. Tolin: Mr. McIntire.

MORTON L. McINTIRE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Morton L. McIntire.

Direct Examination

By Mr. Tolin:

Q. Mr. McIntire, what is your occupation? [124]

A. I am the identification officer at the Beverly

(Testimony of Morton L. McIntire.)

Hills Police Department.

Q. Were you such on 6/21/47? A. Yes.

Q. Do you know the defendant, Allen Smiley?

A. I do.

Q. Did you have something to do with respect to identification work of that defendant at that time, that is to say, on 6/21/47?

A. That's right, I did.

Q. Was he under arrest at that time?

A. He was.

Q. Of the Beverly Hills Police Department?

A. That is correct.

Q. What did you have to do with the identification work?

A. I am the fingerprint man. I took Mr. Smiley's fingerprints after he was arrested.

Q. Do you know Mr. Cox? A. I do.

Q. What was his position with the department at that time, if you know?

A. He was a desk officer, on the desk.

Q. And he took the questions and answers—that is, he questioned the prisoner and took the answers, and you took the fingerprints, is that it?

A. That is correct.

Mr. Tolin: You may cross-examine.

Cross-Examination

By Mr. Neeb:

Q. Mr. McIntire, just one or two questions. Your record that you have shows that he came in about 1:30 in the morning, doesn't it?

(Testimony of Morton L. McIntire.)

A. The record shows that he was arrested at that time.

Q. That would be the time of arrival at the station? A. No.

Q. Does your record show what time he arrived at the station? A. I am not sure.

Q. Pardon?

A. As to the exact time, I am not sure.

Q. Was it sometime after 1:30 in the morning?

A. No; it would be before then.

Q. Do your records also show that he was not held and was released without any charge against him, the following morning at 9:00 o'clock?

A. He was released, yes.

Q. About 9:00 o'clock the following day, is that right? A. That I don't know.

Q. Have you consulted your records before coming down here to testify? [126]

A. I would need the records to more or less prove when he was released.

Q. Do you have those with you?

A. That record that Mr.——

Mr. Neeb: That doesn't show.

Mr. Tolin: I will stipulate he was released in the forenoon on the following day.

The Witness: It shows on the back——

Mr. Neeb: On the back of the one you have?

The Witness: Yes.

Mr. Neeb: Let's see it.

The Clerk: Exhibit 7.

(Testimony of Morton L. McIntire.)

Mr. Neeb: All of this is not in evidence.

Mr. Tolin: It is just for identification. It may go in as far as I am concerned.

The Witness: I think on the back of the property receipt there is a time stamp showing when his property was released to him.

Q. (By Mr. Neeb): Is that a property receipt?

A. That's right. Here is the stamp (indicating).

Mr. Neeb: Can you read that?

Mr. Tolin: You had better ask him to read it.

Q. (By Mr. Neeb): Is that a stamp?

A. Here it is, here (indicating).

Q. Is that where they stamp it? [127]

A. That is correct.

Q. That is the back of this thing (indicating), isn't it? These are photostats, these are different pictures.

A. This here is the back—this is the property receipt, that is the reverse side of the property receipt.

Q. To refresh your recollection, would that give you the approximate time?

A. That is correct.

Q. What would that be?

A. It says 11:34 a.m.

Q. That was the next day?

A. That was on June 21st.

Mr. Neeb: I have nothing further.

The Court: Is that all from this witness, Mr. Tolin?

(Testimony of Morton L. McIntire.)

Mr. Tolin: That is all I have from this witness.

The Court: You may be excused.

(Witness excused.)

Mr. Tolin: If the Court please, I think I am about to rest, but I would like to check the exhibits first, if I may.

The Court: Very well.

Mr. Tolin: There is one thing for which we would have to recall a witness. Maybe we can work it out here.

(Counsel conferring together.)

Mr. Tolin: There will probably be a delay of three-quarters of an hour to get the witness, we haven't worked it [128] out, so I will rest without it.

The government rests.

The Court: Very well. The government rests.

Mr. Christensen: Well, we have some motions.

The Court: All right.

Mr. Christensen: And some legal arguments, your Honor.

If counsel will approach the bench, it might save time and help to formulate the program.

(A discussion was had at the bench without the hearing of the reporter and the jury.)

(Whereupon the proceedings were resumed within the hearing of the jury, as follows:)

The Court: The jury will be excused until 10:00 o'clock in the morning. You will bear in mind the court's admonition.

The court will stand in recess until 2:00 o'clock.

(Thereupon, at 11:45 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [129]

July 13, 1949; 2:00 o'Clock P.M.

(The following proceedings were had without the presence and hearing of the jury:)

The Court: You may proceed.

Mr. Christensen: If the court please, we now make a motion at the conclusion of the prosecution's testimony to dismiss each and every count of the indictment on the ground that the evidence is insufficient to even prima facie-ly support the indictment or any count thereof.

I presume preliminarily it would not be amiss to observe that the evidence here discloses only in the instance of an arrest a violation of local, municipal and state laws with respect to gambling.

As to one he was acquitted of the charge and as to the other he was subsequently released. In another instance when he was interviewed by the Beverly Hills police department in connection with being held for a short period of time in connection with an investigation concerning the conduct and act of other persons—in short, when he was being held as a material witness in the Beverly Hills situation, it will be remembered that the record here discloses, only on the arrest slip, that he responded, according to Mr. Cox' testimony, to the question "Where were you born," "New York." "How long in the county—how long in the state?"

And of course obviously as to that count it wouldn't fit the statute at all which reads that there must be a false representation of citizenship when he is not a citizen either by reason of birth or by reason of naturalization.

I am not so much concerned about the point that I am making on that because it is so apparent. I would rather address myself to the basic subject matter.

Preliminarily at the outset I want to call attention to the fact that there was no question of citizenship—"Are you a citizen?"—like the instance of the forms used by the police department of Los Angeles and the sheriff's office.

We all know that there must be a representation of citizenship—an affirmative act.

The mere negative statement of birth does not in itself establish that. The burden would be on the government to show that there was an affirmative representation and claimed citizenship.

We know that at one time Indians, although native-born, were not citizens.

We also know that children of the Diplomatic Corps were not citizens. We also know that there is such a thing as repatriation in spite of the fact that one may be or had been a native-born citizen.

I only do that to clear up the Beverly Hills situation so we can get down to the essence of Counts 1 and 2 with [131] reference to an arrest card where he said he was a citizen, according to the testimony, and whether or not proof of that

fact alone would satisfy the requirements of the statute and support the allegations of the indictment.

Now, we know that being arrested for gambling, whether he said he was an Indian, Chinaman or anything else, he didn't avoid arrest because in the booking process he answered a question "Yes," to the question of whether he was a citizen.

I am going to deal with that phase of it, that it must be pertinent—that it must be material.

We further know that under the law that one is not obliged to even, when he is booked on an arrest, to give his address. That might be incriminatory in and of itself. He doesn't even have to give his name. He can padlock his lips. There is no obligation imposed upon the prisoner to answer anything. I mean that is academic. [132]

So the mere answer of a question in and of itself is not an affirmative assertion on his part.

We shall see in the cases that it delineates the types of situation in which citizenship when it is affirmatively claimed is significant.

We also know if he had disclosed himself to be a Canadian citizen, or a derivative citizenship might have existed on his part as a Canadian, that in the offense that he was charged he would be dealt with under the law precisely the same way as a citizen would be.

We further know that, while a police department, as an agency, desires all the statistical information it may get for police purposes, for exchange with

other police agencies, and it may be desirable from their point to do so, they are not authorized in law, they have no authority in law to inquire. To "inquire" means to compel.

Obviously, if one were seeking to gain something, then whether he was a Communist or something is different. Suppose it was on the arrest slip, "Are you a Communist?" there may be a law with reference to that subject-matter, and he said, "I am a Republican," it wouldn't make a particle of difference, if he was arrested on a gambling charge. But the moment he would come before the immigration authorities, like a deportation warrant, as we found in this case, then they had the right to inquire, and he was obliged to answer truthfully, and [133] if he hadn't, he would be subject to two things, a charge of perjury, as well as a false representation of citizenship, because it was material to that kind of an inquiry.

In short, when a local police officer arrests one on the highway, they may ask questions or they may see fit to ask questions, but that still doesn't mean that it is in furtherance of, and I quote the words, "in furtherance of official duty," and I shall comment upon that in connection with what our own circuit has said, and that it must be material. That is what the DePratu case holds.

It is not a moral turpitude offense; it is not an anti-social offense at all.

I say that if it is a busybody, and that is all you can say—and it cannot be distinguished, even, from a Gallup poll surveyor—certainly he has a

good reason to ask, he is curious, he is building up certain statistics, but that is a personal good reason. It might be a department personal good reason, as far as police administration is concerned, but it isn't one founded in law. So we must have in mind that while I have the lawful right to ask any of the gentlemen in this courtroom, "What was your income last year?" there is no obligation imposed upon them to answer that. But if the Internal Revenue gentleman asks them that question, that is a totally different situation, because that is in furtherance of his official authority and duty to so inquire, and imposes [134] upon me, then, the obligation to answer and to answer truthfully. And unless it falls in that classification, then it is nothing more than boastful or idleness, and you can tell them anything that you may see fit to tell them.

Because when the Internal Revenue man asks that, that is a legal right, as distinguished from any of us having a lawful right to ask anyone any kind of a question we desire to ask.

In other words, we do not have a moral turpitude or anti-social offense here.

May I just give your Honor one case that perhaps only touches how this type of offense is really evaluated by our courts. It isn't pertinent to the direct issue of whether there was sufficient proof here or not. I direct your Honor's attention to the case of *Frederick vs. United States*, 146 Fed. (2d) 488, a decision by the Circuit Court of Ap-

peals. This is simply designated in showing that it is not basically a moral turpitude or anti-social offense.

The court said in that case that although the indictment charging that defendant, quote, "falsely representing himself to be a citizen of the United States in applying for a poll tax receipt and in applying for a ballot to vote," end of quote, was supported by sufficient evidence, the appellate court said, quote, "The case is suggestive of a witch hunt . . .

"The case is affirmed, but without prejudice to the right of defendant to apply within thirty days of the receipt of the [135] mandate to the lower court for a suspension, or reduction, of sentence."

In that case the defendant was sentenced to 60 days in jail. But even in that case it was in connection with applying for a poll tax receipt and applying for a ballot to vote.

Of course, obviously there is a legal right to ask the question because the law will not permit one to vote who is not a citizen. So there you have a situation where it was pertinent.

When I go upstairs to the Radio Commissioner's office and I apply to be a radio operator, which I must to even operate the small radio set I have aboard my boat, I get a form; now I am seeking something there, your Honor, and when I answer the question, "Where were you born?" and then they follow it up beyond that, not only "Where were you born?" but following that, "Are you a

citizen?" in addition to that, there are three or four questions that they ask because they recognize one might, by reason of repatriation or other reasons, even though being a native-born, not be a citizen of the United States—there I am seeking something, I am looking for something. But if the guard downstairs as I am walking out should say, "Here, I want to talk to you a minute. Are you a citizen?" and if I were not a citizen, I would be perfectly under the law and within my rights, without violating the law, to answer, "Yes," because it is pertinent to nothing, it is [136] material to nothing, and it must be under those circumstances that it is made.

The statute says "represent," which is synonymous with making a claim to citizenship. That is when you go for a license like I just explained, or if you should ask for a liquor license, like in the DePratu case, obviously, since the law requires one to be a citizen before such a license may be issued, the moment he makes that false claim he then gains and obtains something that he is not entitled to.

Now, your Honor, let us find out, really, what we have here to consider, and I say that in the light of the fact that I noticed in counsel's memorandum that he filed with your Honor that he says the law has been settled by Judge Beaumont who heard arguments on the motion to dismiss. Well, that is a decided inaccuracy. I call your Honor's attention, for instance, to the evolution of these indictments, and we finally get up to the point where we

have the allegations that are contained now in this final indictment. In the first indictment, 19778, the charge was that the defendant “did knowingly, willfully, and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship.”

Now, the statute says that he must falsely represent himself to be a citizen of the United States.

By judicial interpretation two circuits have held that, [137] in spite of the fact that the word “fraudulent” was dropped, and a slight recomposing of the language of the statute, that “false” means precisely when you go to represent yourself falsely that you then, in order to violate the law, do so with an intent to defraud. [138]

Some demurrers have been sustained in other districts for failure to show a fraudulent purpose. Now, I am not raising that point here at this time.

But you see they omitted even the word “falsely” and had to amend that indictment and then they came forth with 19926. In that one they charge that he knowingly, willfully, fraudulently, unlawfully and feloniously represented himself to be a citizen.

Now, that might have been good on the interpretation of the word “fraudulently” as being synonymous with “falsely,” but in any event the prosecution elected to again amend its indictment to conform to, perhaps, some of the decisions and then produced the indictment we are here on now before this court. That is 20069.

This one reads:

“Did knowingly, willfully, falsely and fraudulently represent to Cox, an employee of the police department,” and so on, and then with the added words describing Cox as being “a person having a good reason to inquire into the nationality status of the defendant.”

Of course that doesn't mean any idle or boastful reason, but it means, as I have described, a legal reason. It goes on beyond being merely a lawful reason.

Now, we argued the question that a fraudulent purpose [139] was not set forth in the indictment. Counsel countered and said in the *United States vs. Prevost*, a decision by our own Circuit Court of Appeals where the indictment was couched in the precise language of the statute, that that indictment was sufficient to put the defendant on notice.

The argument was made that:

“If that is good certainly when we have embellished it further that should suffice here and we even use the word ‘fraudulent.’ ”

So the form of the indictment, but not the ultimate issue that it had to be material—that was a matter of proof and fact to the particular inquiry and of course that court could not pass upon it.

I refer for instance to what his Honor Judge Beaumont said to indicate that that is precisely what occurred.

So the law has not been settled and we are in a totally different position here in discussing this

motion because there is now presented an absence of proof on these essential and cardinal allegations in the indictment and necessary allegations.

On page 22 Judge Beaumont said:

“Mr. Tolin, your position is that you have followed the wording of the statute in this case.

“Mr. Tolin: Yes, your Honor.

“The Court: Now, does it say a good reason to [140] inquire or an adequate reason?

“Mr. Tolin: The statute reads thus:

‘Intentionally to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.’”

Intentionally to falsely represent himself.

“Mr. Christensen: It is the word ‘falsely’ that has been indicated by two Circuit Courts of Appeals to mean for a fraudulent purpose. That is the element that is lacking here and which we urge should be.

“The Court: This opinion held that where it is stated that a defendant intentionally and falsely did assert that that is equivalent to saying that it was done for a fraudulent purpose.”

Then I raised the question:

“But they didn’t plead facts to support that allegation.”

So we have purely a holding, as far as the law in this case is concerned, that the indictment as to form and substance was sufficient.

Now, have they filled the shoe of the indictment?

And that is what I am addressing myself to at this phase of the [141] proceeding.

I am going to take first the De Pratu case, which is the last one by our Circuit Court of Appeals.

While we have read that statute I would like to read it again. It is only three lines. That reads:

“Knowingly to falsely represent.”

There is a vast distinction between an affirmative representation and purely an answer to a question such as was asked here by an arresting police officer under the circumstances of booking the defendant and to which the defendant need make no reply.

“Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.”

Now, let us see what our latest decision is. They attack first the sufficiency of the indictment and secondly the sufficiency of the evidence.

The indictment in that case charged the language of the statute, that:

“He knowingly, falsely and feloniously represented himself to be a citizen when he was not,” and in the one count after that language the court goes on to say: “Each of the counts charges the appellant on a stated date so made the false statement [143] of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board by answering ‘Yes’ to the question ‘Are you a citizen of the United States?’, when appellant was not, and well knew he was not, such a citizen.”

That is in the first two counts and the third count:

“That the appellant so made the false statement of citizenship on September 11, 1946 before a board of special inquiry of the Immigration and Naturalization Service of the United States when, as a witness, he testified that ‘I acquired United States citizenship through my father who naturalized in the United States when I was a minor,’ in answer to the question ‘Of what country are you now a citizen?’, when appellant was not, and well knew he was not, such a citizen.”

In other words, he affirmatively comes forth as a witness and under oath states certain things, while here we have nothing under oath, except when he was under oath and told the truth to Mr. Hamilton of the Immigration Service, which was actually at a time prior to the time of, I think, two arrest slips in this case—yes, prior to the time of two arrest slips in this case.

He testified, again, “I acquired United States citizenship [143] through my father who naturalized in the United States when I was a minor.” He made that answer to the question, “Of what country are you now a citizen, when appellant was not, and well knew that he was not, such a citizen.”

Now, then, on the attack as to the sufficiency of the indictment the court said:

“The attack upon the sufficiency of the indictment is based upon asserted necessity for allega-

tion and proof of fraudulent purpose in the making of the false claim of citizenship.”

The court there held that the statute under which this indictment was laid does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship.

Now actually as to the phase whether the proof would require fraudulent purpose is pure dictum because that was not before the court. But as to the lack of need to affirmatively plead, as some of the other courts have held, that of course is a direct, decisive point and was before the court.

I am making no contention here at all on the question of pleading a fraudulent purpose. But there are other cases, and we will note that this case can be actually reconciled in spite of those few words, with the *Achtner* case and the case, one from the Second Court of Appeals and the [144] other from the Seventh Court of Appeals, which I will come to in a moment because of the next question, and that is the one we really have here before us—whether or not this was pertinent to any inquiry at all.

Now, here is what our Appellate Court said:

“Appellant also contends in effect that the charges and proof do not sufficiently show that his claims of United States citizenship were material to the transactions at hand and were not mere boastful or jesting assertions”—were not material to the transactions at hand.

Let us see what the Appellate Court said:

“But the first two counts charge and the undisputed evidence establishes that the allegedly false claims of citizenship were made in appellant’s applications for a Montana liquor license filed with the Montana Liquor Control Board. At the time of such filing, no one but a citizen was eligible for a liquor license under Montana law.”

In other words, it was material and it was pertinent.

“The third count charges and the supporting evidence indicates that the allegedly false claim of citizenship was made by appellant as a witness before a board of special inquiry of the Immigration and Naturalization Service. The evidence [145] further discloses that while so appearing before the board, appellant was testifying in aid of another alien’s application for admission to this country to become an employee in appellant’s business.

“In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority.”

Obviously it must have been in furtherance of their official authority because he couldn’t get a license in the first place unless he was a citizen. They only issued as, if and when the man is a citizen and you can’t support the other phase of naturalization unless you too are a citizen.

“Obviously, appellant’s claim of United States citizenship in response to such inquiry could not be said to have been made as ‘a mere boast or jest or to stop the prying of some busybody.’ ”

That meets the requirements of United States *vs.* Achtner. And so far as the defendant's rights are concerned or, rather, a prisoner's rights are concerned or anyone arrested, the police officers, when they go into inquiring under a condition of arrest it is nothing but precisely a situation of prying into somebody's business by some busy-body.

They follow the Achtner case here, your Honor. You will [146] observe that on the question of materiality. Now, we know that it wasn't material in this case. We know it wasn't pertinent to any arrest. The most you can say is that they wanted police information.

We also know too, your Honor, that when a man is arrested we know something of the practices. We have it before this court, and that is if the prisoner exercises not only his lawful rights but his legal rights and declines to be fingerprinted or declines to state his name and address—well, of course they book him and can hold him on suspicion for 72 hours and they usually cool him off by sending him into a cell and keeping him there until he is ready and willing to be cooperative in answering questions. In other words, his booking will not be completed and his bail set unless he does so and we know there is always the intimidation when that police officer takes you by the shoulder and marches you into a booking office.

There is a semblance of duress there and when they say here: "What is your name?" "We are booking you," and take your money, there is no

affirmative movement upon the part of any prisoner to say: "I want to say this, I want to say the other thing," but you always have the hand of compulsion. But, regardless of that, we do know that it wasn't pertinent anymore than if they were interested in one's religion, one's income, the number of children he has—interesting statistical [147] things, yes, maybe for social welfare work. But the individual and the residence or the age, be he citizen or not, he is under no such obligation to answer under those circumstances. He would be before the immigration authorities. He would in a registration where somebody has the legal right to inquire. Now, the Achnert case—let me see. Now, we know that in the De Pratu case in determining the question of pertinency and materiality it follows the Achnert case and that is by, I think, Judge Hand, of the Second Circuit Court of Appeals—no, I am mistaken. It is by Circuit Judge Clark with Hand, Swan and Clark sitting.

In that case he was charged with falsely representing himself to be a citizen when he was not and he pleaded guilty. Then he made a motion for permission to withdraw the plea of guilty and the court denied that motion. He wanted leave to change that plea.

He asked that privilege on the ground that no offense against the United States had been charged and consequently in this case we get into the question of when you may change a plea. I think the

rules have been somewhat modified since that time, but that of course isn't pertinent here.

Counsel has cited some phases of it and it is worthwhile reading the revised or amended section because it is now going to deal with the introduction into the statute of the word "falsely" and its significance and the elimination [148] of the word "fraudulent."

The statute, 8 U.S.C.A., Section 746(a), sets out in 34 numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country.

It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places.

Subdivision (18), with which we are immediately concerned, makes it a felony for any alien "knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

Then quoting the statute:

"This subdivision is a substantial reenactment of the repealed 18 U.S.C.A., Section 141, originally passed in 1870, which, under the heading, 'falsely claiming citizenship,' made liable to fine and imprisonment any person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' " [149] Thus,

the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' Significant also is the increase in the penalty by the later legislation from a maximum of \$1,000 fine and two years' imprisonment to a \$5,000 fine and five years' imprisonment.

"The first and most important question with which we are presented concerns the sufficiency of the indictment, which, as we have seen, does little more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules" and so on.

Then they proceed to analyze whether or not the language of the statute is sufficient to put the defendant on notice and they hold that it is. So there they sustained the indictment. But the court proceeds:

"As defendant here does not, as well as he could not, claim to have been prejudiced in his defense or placed in danger of double jeopardy, the indictment must, therefore, stand against any objection to merely its generality of allegation. So that question is out of the way. Then the court proceeds: [150]

"Under this statute no imitation was placed upon the circumstances under which and the person to whom the false representation was made as long as it was for a fraudulent purpose."

And that is referring to the originate statute.

“Included among such purposes, according to the precedents are the securing of registration as a voter, the obtaining of a passport and, it seems, the gaining of entry into the United States.”

And then they proceed:

“And the intent of Congress in October, 1940, when Section 141 was replaced by Section 746, was quite obviously to extend, rather than to reduce, the coverage, as well as the penalties, of the prior law, for the latter statute was part of the Nationality Act of 1940, a national defense measure enacted in the face of the impending war to help tighten controls over the conduct of aliens in this country.”

Now, the court proceeds:

“This conclusion disposes also of defendant’s cognate contention that the prohibited representation must be made to the government or one of its agencies [151] and cannot be made to a private individual in a private capacity.”

That, of course, was never contended nor was it an argument at any time.

There is no question whatsoever about an employer who may for security reasons or even for a matter of plant efficiency desire certain information. So if you seek employment from someone, that someone has a right—he has not only the lawful but he has the legal right to ask the questions and get honest answers because if you don’t give him an honest answer then you are guilty of deception and it is the deception that is struck at because if it isn’t deception it is not pertinent.

But if you do say you are a citizen and you are not, he may place you in a category that he would not if he knew that you were not a citizen.

Then on the other hand he may, so far as the efficiency experts are concerned or the psychiatrists of the plant, have taken a different position. In other words, he is entitled to know. You are entitled to know, I would assume, if one seeks a position perhaps where one is a member of a type of union that an employer might believe was not compatible with his operations—a municipality may even ask: “Are you or have you ever been a member of the Communist Party?” And it may even go so far that if it is required to be made under oath [152] that therefore it might even be perjury. In fact, it would if they had the legal right to ask that question.

A municipality has the same right in employing policemen, and so has the private employer the right to inquire and a right to truthful answers.

So, they sweep away the contention that it is only a governmental agency. Of course, we make no such contention here and never have. So they proceed:

“As we have seen, the history of the legislation definitely implies the contrary, and we see no ground for the weakening of the statute by the construction thus urged. Nor is there any basis for its claimed unconstitutionality, since the Congress has ample power to impose a regulation of this kind upon the conduct of aliens in this country.

But we agree with the District Court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus, it is said that the word 'falsely' particularly in a [153] criminal statute, suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously' or 'with intent to defraud' as has been held with respect to the counterfeiting laws."

Now, that is the case cited by our Circuit Court in the De Prato case and they hold that, brushing aside the contention there that it was material and pertinent, but we say here it was not material or pertinent to any such issue.

There is a very interesting opinion, your Honor, as to when one has these legal rights to inquire.

While it was not this type of a case, it involved where the one agency who did not apparently have jurisdiction over the particular matter did make some inquiries. It is an opinion that we have been using around here, by our federal judge, Judge Pierson Hall, in the case of United States vs. Steve White and A. C. Dunham, Case No. 18944, and it contains some very apt language. I just borrowed this from the judge's secretary, and rather than state the substance of how the question came up, I

think he does that much better than I could in this written opinion. He says:

“The term ‘jurisdiction’ as used in Section 80 is, of course, a different term than ‘jurisdiction’ as used in connection with courts. The word ‘jurisdiction’ is synonymous with the word ‘power,’ that is, the power to act. I think as it is used in Section 80 and as it is used in Title 8, conferring upon the Department of Justice ‘jurisdiction’ concerning aliens and the matter of naturalization and the like, it means, as among the different agencies and departments of the Government, that the Department of Justice, and no other department, shall have power to investigate and to do the other things required or permitted of it by Title 8. That is to say, the Department of the Interior could not go out and investigate or make arrests or hold hearings concerning the matter of aliens, [155] nor could the Treasury Department or the Department of Agriculture, or the Navy Department, nor any other department. So, as between the different agencies of the Government, I think that term as used means that jurisdiction is the power of that particular agency to administer and enforce the law.

“That points up the proposition that the deception which is condemned by the statute—and deception is what the statute condemns—must be practiced upon the particular department or agency involved. For instance, if a person would make a statement to the Department of the Interior concerning his alienage or the date of his birth or

the fact that he arrived in the country on a certain date, or something like that, although he might commit a violation of the law with relation to some Act that the Department of the Interior was charged with enforcing, I certainly do not think that would be such a deception as would carve out the crime of deceiving the Department of Justice within the concept of the term as used in Section 80.

“I do not think the statute can be stretched to cover a deception of a state police officer or any state agency or of an individual person in connection with the administration or enforcement of any of the laws of the Government of the United States. If it can [156] be stretched to cover deception that is practiced upon a state policeman, then it can be stretched to cover any deception or false statement made, for instance to an inquisitive neighbor or friend or business associate concerning your citizenship, or your income, or any of the almost innumerable facts of life which are now regulated by—and thus within the ‘jurisdiction’ of some department or agency of the Government.

“For instance, if in a conversation with a brother lawyer one should deliberately misstate his income for last year, one would be guilty of a crime because the investigation of violations of the income tax law is under the ‘jurisdiction’ of the Bureau of Internal Revenue. And you can carry it further. You can get it down to where if one lied to a neighbor or friend about one’s age, or actual residence on a particular street, it would be a crime for making a

false statement in connection with a matter within the 'jurisdiction' of some department of the Government, because certain agencies of the Government are charged with enforcement of the Selective Training and Service Act, and the age and residence of male persons are material facts in connection with the administration of that law. Examples can be multiplied."

We say it is not pertinent and it is not material.

Let's assume one of our agricultural inspectors under the Agricultural Department of the United States, whose duty it is to survey pest control, to ascertain whether or not the Mediterranean fly is floating around in certain districts, and he finds one that looks rather rugged, badly beaten down, he is making his inspection and he talks to a farmer at the time, and the farmer, maybe, looks like an alien or something, and he asks him, "Are you a citizen of the United States?"—if he answered, "Yes," what difference would it make as to whether the bugs could be controlled and to condemn the pest situation in that particular area?

It is not making an affirmative claim.

And that illustration is just as apt as when Mr. Smiley was arrested for gambling, shooting dice, and it made absolutely no difference and it wasn't pertinent at all.

And the De Pratu case does say that it must be in furtherance of an official authority and duty. "In furtherance of an official authority"—and the word "authority" is very significant there—"and duty."

It implies the power to do so, just as Judge Hall has mentioned in this decision. And they lacked the official power in this instance to make that kind of an inquiry. And when he was obliged to do it with those that did have that authority and that power, then he answered truthfully each time. And I submit, your Honor, that the evidence here is wholly lacking in supporting the [158] cardinal allegations of this indictment, that he wilfully, falsely, and fraudulently represented himself to be a citizen of the United States, and the motion should be granted.

Mr. Tolin: I have a rather long memorandum on this point. I don't know if it was filed early enough and the court has had an opportunity to read it, but referring to that memorandum there are a few things that were suggested by counsel's argument that might be treated here briefly.

He made some point that the defendant Smiley when he was in the various police and sheriff's stations was not gaining anything by any statement that he made; that his statement was one which was made merely to satisfy the Police Department, and not for any advantage that might accrue to Smiley.

We know from this evidence, that is, the evidence in this case, that Smiley was an alien. We know from the testimony of Lieutenant Cunningham of the Los Angeles Police Department that whenever an alien is arrested and admits his alienage upon the inquiry, it becomes a part of their record, or

when the department has reason to believe that the arrestee is an alien, that they call—that is, the Police Department calls the Immigration Service and tells them about it, that they have arrested that man, and for what. So that the department of the government which has jurisdiction over matters of deportation, naturalization, and other alien control matters, is placed upon notice. [159]

I do not know whether Mr. Christensen is right that a man standing in the booking office of a police station after being arrested has a right to not answer any questions. But if he has and does answer them, if he has a right not to answer but he elects to answer, it would seem that he would be in the parallel position of a defendant in a criminal case who has no duty to testify but who elects to testify. When he does undertake to testify he is obligated to tell the truth, otherwise he is subject to the prosecution which follows for perjury. And if this man in the booking office elected to answer questions, then he is liable to answer them correctly, at least to answer them free from misleading deliberate falsehood.

And had Mr. Smiley, according to the evidence here, had a matter pending before the Immigration Service, they were interested in him, they had a deportation warrant, or something of the sort, out for him—had they got a telephone call from Mr. Cunningham, as according to Cunningham's testimony they would have received one, had Mr. Smiley said that he was an alien, then that agency which

did have a proceeding which might have resulted in deportation, that agency would have been alerted to the fact that this man was in trouble with the Police Department, at least that a charge had been brought against him, he was there at the jail, or he had been unless he made bail, and when the defendant stood up to [160] the booking officer and said, "I was born in New York, I have lived here all my life, I am a citizen of the United States,"—by that fact he procured whatever advantage there is in not having the Police Department report him to the immigration authorities for whatever use the immigration authorities would desire to make of the information that Smiley was in trouble because of the gambling laws or was under questioning and was held in connection with a murder, or something of that character. I think it might be a very substantial advantage to one who is the subject of inquiry with respect to his right to be in the country, to not have the immigration authorities get a phone call from the Police Department saying, "We have a booking down here by the name of Smiley who is an alien."

Although Smiley was there before the Immigration Service, he was there upon his representations, and they did not include, of course, the matters respecting which he had been arrested by the Los Angeles Police Department.

Petition of Ledo in 67 Fed. Supp. 917 was a case——

Mr. Christensen: What was that?

Mr. Tolin: 67 Fed. Supp. 917. That was a case in which a false claim of citizenship was made in one instance to a union. That is, one of these long-shoremen's unions, Local 1329. Whether A. F. of L. or C.I.O. doesn't appear, but in any event it was a union. You had to be a citizen in order to hold a certain position, elected position in the union, [161] and one of the statements of citizenship was supposedly made to that union, then there was another one that was made in this way:

“Q. Did you ever claim to be a citizen of the United States for any reason?”

There are questions before the Immigrant Inspector, and the matter arose upon an application for citizenship, which was denied.

“Q. Did you ever claim to be a citizen of the United States for any reason?

“A. Yes, I did down to Quonset.

“Q. Now, in regards to your having claimed American citizenship at Quonset, as you have previously testified. Will you explain more fully?

“A. Well, when you sign the papers you got to state where you were born and so forth.

“Q. And what did you do?

“A. I just wrote down ‘Born in New Bedford, January 16, 1894.’

“Q. Did you ever claim to having been naturalized at New Bedford, Massachusetts, in 1926?

“A. Yes, I forgot that, that's right.

“Q. You admit having claimed American citizenship on those two occasions?

“A. That’s right. [162]

“Q. Will you explain to me the circumstances under which you made those claims?

“A. I wanted an interview with Mr. ———, the officials of Merritt, Chapman and Scott, they are the contracting stevedores for the Navy. * * *

“Q. And what was your purpose in claiming American citizenship at that time?

“A. So I wouldn’t have no troubles getting in.”

Then it appears he wouldn’t have trouble getting through the gate to get up into the navy yard to talk to these contractors.

That man was obtaining an advantage, he was getting through a gate, he was getting access to certain officials of this operating company, these contractors, I suppose so he could apply for a job. Anyway, he was getting access there by claiming to be a citizen.

Smiley, on the other hand, was gaining the advantage of not having it brought to the attention of a federal agency, which was investigating his right to remain in the country, that he was in trouble with the local police over gambling.

I think that was a fraudulent purpose he had in mind. It certainly resulted in the failure of the Immigration Service to get that call from Lieutenant Cunningham, or Lieutenant Cunningham’s subordinates.

Now, concerning the test by which a person in-

quires into the nationality status of a person. We have not pleaded here [163] as generously as counsel suggests. The language of the indictment says, with reference to Thomas A. Cox, "being a person having good reason to inquire into the nationality status of the defendant." Not that he had any duty with respect to the nationality laws, or that he was even under any mandate of the duty of his office to inquire, but one having good reason to inquire.

Your Honor heard the testimony of Mr. Hood this morning, and your Honor knows of the statutes under which the Federal Bureau of Investigation maintains that central indexing of identification data in Washington, D. C., and how appropriations are made by Congress after Congress to the operation of that department, so that any police office throughout the United States may telegraph in to the Federal Bureau of Investigation and receive from them that identification data; that the Federal Bureau of Investigation makes certain references of information to the Immigration Service, and there is an exchange between the police departments, they sending in information and the Bureau sending back information, each providing the other in their correlation of identification data.

The law contemplates, certainly, that when a large central identification bureau is set up, such as the F.B.I. has in Washington, with the power of the Bureau to send out reports, to provide blank forms to the local police departments [164]

by which fingerprints and the other accompanying identification data is forwarded into the Bureau, it must be contemplated by those who frame a law that sets up that machinery, that the machinery is going to be used, that it is going to operate, that officers are not going to stop at taking the fingerprints, but that they are going to get the answers to the other questions, as well, and an officer, therefore, has a good reason to inquire.

I don't know, and I don't think it is necessary to answer here Mr. Christensen's theory that a man at the booking office can stand mute and not even give an answer as to his name, and can refuse to have his fingerprints taken. I don't know what the answer to that might ultimately be. I think Mr. Christensen is wrong, at least, in part of it. But when that man at the booking office does give the information, he takes the obligation to give it truthfully, and when he makes a positive assertion, gains the advantages which I have stated and illustrated to the court, he takes the duty to give true information.

Counsel has talked a lot here about fraud, and it is true that the indictment does, along with the general evidence that accompanied these allegations, say that the statement was fraudulently made. I think the evidence of Cunnigham and Hood——

The Court: It doesn't say "fraudulently made," does it? [165] It says "falsely made."

Mr. Christensen: Falsely and fraudulently.

Mr. Tolin: The indictment says "fraudulently."

That is surplusage. That indictment was drawn before the decision came down in the De Pratu case which says it isn't necessary. The De Pratu case says this about fraud. It says:

“The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant's contention, that Section 746 (a) (18), Title 8 U. S. Code, under which this indictment was laid, does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was superseded by said Section 746 (a) (18). We find no error in the trial court's refusal to dismiss any count of the indictment for failure to allege fraudulent purpose or for any other reason.”

Then, in that earlier case of *United States v. Achtner*, which is cited in our memorandum, the elements of the offense [166] are set out. It says:

“The indictment here charged that on or about October 8, 1941, defendant, Wolfgang T. Achtner, being an alien never naturalized as a citizen, ‘unlawfully, willfully and knowingly did falsely represent himself to E. L. Kenney of the Ebasco Services, Inc., 2 Rector Street, New York City,’ to be a

naturalized citizen of the United States, in violation of 8 U.S.C.A., Section 746 (a) (18), which was expressly cited.”

Then it gives the history of the arraignment, and so on.

“Thereafter, on February 2, 1944, he moved for an order permitting him to change his plea to ‘not guilty’ and to quash the indictment as insufficient on its face. The court denied the motion, however, in a considered opinion and sentenced defendant to imprisonment for three years. This appeal attacks the judgment of conviction and the denial of the motion to quash the indictment and change the plea of ‘guilty’ on the ground that no offense against the United States has been charged.

“The statute, 8 U.S.C.A., Section 746 (a), sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and [167] the control of aliens in this country. It represents for the most part a codification in one place in the Nationality Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien ‘knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.’ [168]

“This subdivision is a substantial reenactment of the repealed 18 U.S.C.A., Section 141 which,

under the heading ‘falsely claiming citizenship,’ made liable to fine and imprisonment any person who ‘for any fraudulent purpose whatsoever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.’

“Thus, the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words ‘knowingly to falsely represent’ in the place of the prior representation ‘for any fraudulent purpose whatever.’ Significant also is the increase in the penalty by the later legislation from a maximum of \$1000 fine and two years’ imprisonment to a \$5000 fine and five years’ imprisonment.”

Mr. Christensen: Doesn’t the opinion go on and say it must be with an intent to defraud? Don’t they interpret the word “falsely” there?

Mr. Tolin: Mr. Christensen, I think you will have an opportunity for rebuttal but I will read the next paragraph if you would like to have it read. It doesn’t go into that matter at all. It says:

“The first and most important questions *with we* are presented concerns the sufficiency of the indictment, which, as we have seen, does little [169] more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules of common law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations.”

That is all copied out of the opinion.

Mr. Christensen: I see. All right.

Mr. Tolin: And you may use the one from our library.

Mr. Christensen: I have it here.

Mr. Tolin: I think those cases, your Honor, considered in the light of the evidence of the witnesses from the Federal Bureau of Investigation and of the police department—the Immigration Service, showing how they correlate this information indicates that there is no question but what a case has been made out and the defendant should be put to his defense.

The Court: What do you think about Count No. 1? Do you think the allegation as to citizenship is proved by proof that the defendant made a statement that he was born in the United States?

Mr. Tolin: At the outset of this trial I didn't know whether that count was going to be made out or not because under the Warazower case, which your Honor has no doubt read, we have to show, if we are relying on the admissions of the [170] defendant that he is not a citizen of the United States, we have to show that they were made prior to the commission of the offense.

I take it that is what your Honor has in mind and the statement as to Mr. Siu was made prior to that time.

Now, the Warazower case says unless corroborated, and I think corroboration is explained in this instance—that is, you can't rely upon the mere statement of the defendant unless corroborated.

It is corroborated by the fact that he repeatedly made the statement. He made it under circumstances which made it good as to the count and he made it under circumstances which made it good as to Counts 2 and 3 and therefore we don't have the jeopardy of its being treated as a confession and when I offered in evidence here this morning the statement that he made to the Immigration Service on that subject, first counsel objected to it and I undertook to withdraw one of the documents because there had been the objection of materiality, and I thought, well, maybe as to that Siu count there might be a question, so as I said, I started to withdraw it and then Mr. Christensen said he would withdraw his objection and consequently it is in without objection entirely.

It practically amounts to a confession so I think Count 1 is good. I think that is the only one which there might be any substantial question about. [171]

I realize there is a question on that but I thought the question is one which we can well resolve in favor of the government.

Mr. Christensen: If your Honor please, I don't know but what your Honor had in mind the Beverly Hills count.

The Court: I said Count 1. I didn't say "Beverly Hills."

Mr. Christensen: I mean the one with reference to Beverly Hills.

The Court: The Beverly Hills looking.

Mr. Christensen: I don't know whether that is

Count 1 or not, your Honor. That is not the Siu situation; that is Cox.

The Court: That is Cox.

Mr. Christensen: Yes, he testified he asked him when he was born.

The Court: Born in New York. That is all he stated.

Mr. Tolin: I misunderstood what your Honor had in mind. The case which I have handed Mr. Christensen, the one in which the petition of Ledo from which we read—in that case the court found—you have to read the whole opinion in order to get it because it reads as if it were an opinion given from the bench and perhaps not pulled together into succinct paragraphs that courts will do when they edit and give it out as a published opinion.

It is a District Court opinion, however, but in it the [172] court concludes that the statement that a man was born in New Bedford, had been there all of his life is a statement that he is a citizen. [173]

The Court: And he stated upon further examination that he had applied for citizenship at New Bedford. That was the way I understood it.

Mr. Tolin: I think that was the basis of the court's finding of a second false statement.

The Court: I haven't read the case; I heard you gentlemen read from it.

Mr. Tolin: Then with respect to that Count 2, your Honor, after he had stated to Mr. Siu that he had been in the United States all his life, which would mean that he would be a citizen unless he

was a child of some diplomat, and I think Mr. Christensen suggested that that was at least a legal possibility in these cases, that would put him in the class of those defendants who having peculiar knowledge of an exception have to prove the exception rather than the government negating the exception.

So, unless he is the child of some diplomat who was here in the diplomatic service, he could not have been born in the State of New York and be in this country all his life without being a United States citizen.

Of course, there is the other exception that he might have gone somewhere and renounced his citizenship but that too would be a matter peculiarly within his own knowledge and would be a matter of affirmative proof.

Mr. Christensen: The Ledo case is utterly and completely [174] of no relationship to the problems that I have discussed.

There it was the contention of the government that the petitioner—it was a petition for naturalization and based upon the fact that he had falsely, in connection with trying to, I believe, get into a union so that he could easier have contact, that he falsely claimed to be a citizen and also that he had falsely stated that he had been naturalized. It doesn't involve any element at all—it was purely a matter of discretion there of whether or not they were going to deny his petition. The barn door was wide open. It is not narrowed down like in a

criminal case and it is utterly nonapplicable to the situation that we have here.

A terrifically significant thing here, your Honor, is that we have noticed that counsel by-passed completely the fact that in our Circuit Court here they hold that pertinency and materiality is important. They discuss the whole phase of why it doesn't fit the Achnert case. The Achnert case wouldn't apply in that in this case for an application for a liquor license and supporting another man's citizenship then a false statement with reference to citizenship was vitally pertinent and material. And I say that there isn't the slightest answer by counsel as to whether it was pertinent and material in connection with his arrest.

He moves off into the most amazing argument I have heard, your Honor, that because you have a central agency gathering [175] information that he hasn't the right either as a resident or citizen, to capture heavy advantage when he may be arrested; that he must expose himself so that he can be arrested by some other agency.

The law imposes no such duty at all. We do know that our law protects the citizen. We do know that there is something in the Constitution and the amazing thesis that I have heard here that because a central agency of a police department should get this information and he gains the advantage so another one may not arrest him—that he should come forth and answer such questions truthfully—you might just as well say that is a

private detective agency were saying, "Well, we supply this information because when we do we are in a better shape with the police department—we might curry some favors," and so he gained an advantage by even lying to a Gallup Poll surveyor or investigator.

That isn't what we are aiming at here, your Honor. We are aiming at something that is perfidious and something that is treacherous. That is in the precise language of the Achtner case. The word "false" means more than a mere untruth.

The most you can say of it is it is a mere untruth to a police officer who in and of himself had no right, legal right, to so inquire and it doesn't fit the pattern of the shoe of our own Circuit which says that that inquiry must be [176] in furtherance of his official authority and duty.

There is no answer to that at all. And I say, your Honor, that it doesn't—that he has absolutely the right under those circumstances to say anything he wants. There isn't any evidence of deception here at all before the Immigration Department. Who did he deceive? The officer who was after an accumulation of statistics or data, carrying out a universal policy *policy* and because he didn't co-operate and fit into the picture and the mechanics of police administration counsel argues therefore that he gained an advantage and he should have told the truth.

I say, your Honor, that it doesn't fit the Achtner case and it doesn't fit the De Pratu case in any

sense and it is an amazing argument and I think an un-American argument.

Mr. Tolin: Counsel apparently didn't get the portion of my argument which was that inasmuch as the police department is under an obligation and custom to refer to the Immigration Department information on all persons who are aliens and who are arrested, that Mr. Smiley, who had a case, a deportation case pending in the Immigration Office, already gained the advantage of not having the police department call up and say that Smiley was there charged with bookmaking and that was an advantage. It kept the police department from giving the Immigration Service that which the Immigration Service was entitled to receive and the police department under obligation [177] to furnish. And if Smiley didn't want to give that information he could have used the classical answer of those who don't want to answer by saying or refusing to answer the question upon the ground that the answer might tend to incriminate him. He didn't do that. He went forward and affirmatively lied about it.

Mr. Christensen: Obligation? Listen to that, obligation. It is the obligation of the police department to give that information. It was the obligation of the police department and the custom to give that information to the Immigration Department and the Immigration Department was entitled to receive it. For heaven's sake, the police department could thumb its nose if it wished to the Immigration Department. It could say—supposing it had dis-

covered Communists. The police department was under no obligation to give that information to the Immigration Department and the Immigration Department was not in position, legally, to demand that information. In other words, if we reduce the offense under this statute because of a comity between agencies, and that is where we are finally reducing our position to simply because whether you might have comity with any kind of agency you might say "Well, now, that is nice, we will call them up. Now we may serve a warrant a little bit earlier," but that didn't even exist as to some of these counts because the Immigration Department already had had him before them and [178] he testified as to who and what he was.

We have counts in this that actually are subsequent to that. Why should those counts be in here even if that kind of thesis had any degree or semblance of validity to it at all?

Mr. Tolin: One other comment——

The Court: Well, this argument has to end some time and it might as well end now.

The court will take the motion under advisement and rule on it at 10:00 o'clock in the morning.

In the meantime we will go over your requests in chambers.

Mr. Christensen: Very well, your Honor. May we have a five-minute recess?

The Court: Yes, the court is recessed until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:45 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Thursday, July 14, 1949.) [179]

July 14, 1949; 10:00 o'clock a.m.

(The following proceedings were had in chambers without the presence and hearing of the jury:)

The Court: The record may show at this time that the defendant's motions made at the close of the government's case are denied.

You can state your exceptions to the failure of the court to give certain requested instructions; and if you have any exceptions, Mr. Tolin, you may do likewise.

Mr. Tolin: I have no exceptions.

Mr. Christensen: In the light of the court's announced general instructions, we have no exceptions to take as to the first 18 instructions offered, the instructions being the ones filed in advance of the trial.

As to those that the court in the group of 18 that he is not going to give, and there are five of those that the court has announced that he is going to give, since the court is giving our requested instructions 17 and 19 and 21 and 22 and 23, and instruction 24 and instruction 25——

Mr. Tolin: I am not sure about 24. May I see that one?

Mr. Christensen: It was amended.

The Court: Yes.

Mr. Christensen: And instructions 25 and 26

and 32, some of which instructions were amended with the consent of [181] the defendant, we have therefore no exceptions with the exception of an exception to the failure to give instructions 27, 28, 29 and 30.

Our exceptions with respect to those instructions is as follows:

As to instruction 27 we feel that the jury should be informed with respect to what, if any, obligations the defendant was under to answer questions propounded by local police officers in connection with the arrest or detention as a material witness in a matter involving the violation of a local gambling law, namely, that he was not required to state whether he was or was not a citizen. [182]

The same reason for the exception to Instruction No. 28.

The same as to 29.

The same as to 30, with the added reason that the jury should be informed that an individual's birth or citizenship—Strike that out—that a police officer, in connection with the arrest of an individual for an alleged violation of gambling laws, as to the place of an individual's birth or citizenship, that the arrestee is in such circumstances under no legal obligation to answer such question truthfully.

I think that is the series, Judge. Let me see if there are any in the supplemental instructions.

I understand, also, that the general instructions are being amended to include the one sentence in 1-S with reference to the point that the defendant is

not called upon to produce any evidence whatsoever as to his innocence.

I think your Honor wrote that in.

Mr. Tolin: Are you referring to the printed Judge James' instructions?

Mr. Christensen: Yes.

The Court: Yes. Following that insert No. 2.

Mr. Christensen: And I have withdrawn my supplemental instructions filed at the conclusion of the prosecution's case—I withdraw 2, 3, 4, 5, 6, and 7.

We except to the failure to give Supplemental Instruction 8-S. That under the state of the evidence here the mere [183] response by the defendant at the time of being either held as a witness or arrested for violation of gambling laws in connection with his being booked is not a claim, in the sense of the statute to be involved here, to being a citizen of the United States.

I think I announced I withdrew 7-S. I see that that is marked on mine "Refused."

The Court: It is covered in your main instructions.

Mr. Christensen: I was just going to say that I do not recall of any instruction which deals with the meaning and significance of the word or words "represent oneself as a citizen," and the language of the statute is "one who falsely represents himself to be a citizen," and that the yardstick or standard by which the word "represent" should be given to the jury, so that they may have an understand-

ing of the charge—that the word “represent” as set forth in the indictment, we say, should be defined to be that it means to hold oneself forth as a citizen, or to affirmatively claim to be a citizen, and that the naked answering of a question by an arresting officer in connection with a violation of local or municipal laws in and of itself does not constitute representing, as the term is used in the indictment.

The Court: I will give the first sentence of the second paragraph.

Mr. Tolin: The second paragraph, Judge, while——[184]

The Court: I say the first sentence.

Mr. Tolin: The second paragraph, he has commas——

The Court: I put a period there, and it covers it all. I will give that first phrase.

Mr. Tolin: I think he is entitled to that. Ending with “United States”?

The Court: Yes, “United States” period.

Mr. Christensen: I think that concludes it, then.

Mr. Tolin: I would like the record to show, in connection with Government’s Instruction No. 6, which we offered, that Mr. Christensen took exception to it at the time we formerly discussed it, and that he had submitted an alternate instruction on the same form, and that his instruction is to be given in lieu of ours at his request.

Mr. Christensen: That is satisfactory.

The Court: Let’s see what No. 6 is.

Mr. Tolin: No. 6 was the one in which we stated the elements of the offense.

The Court: That's right. All right.

Mr. Tolin: Our No. 6, then, will remain in the record as part of the record, so that if there is later——

The Court: Yes, we will give them all to the Clerk.

(The following proceedings were had in open court in the absence of the jury:)

The Court: Were there any other motions to be made in [185] the absence of the jury?

Mr. Christensen: I think not, your Honor.

The Court: You may bring in the jury.

(The following proceedings were had in the presence of the jury:)

The Court: Note the presence of the jury and the defendant. You may proceed.

Mr. Christensen: So stipulated, your Honor.

Mr. Tolin: So stipulated.

The Court: You may proceed with the argument.

Mr. Christensen: I believe, first, your Honor, I agreed to do this. I am prepared to stipulate, and I presume that will be as if it were a part of the plaintiff's case, that the defendant, Mr. Smiley, was born in some unknown town, approximately 40 years ago, in Russia, the map having been changed since, and I don't believe it is now a part of Russia, and as a baby he was brought to America, disembarking with his parents in the Dominion of Can-

ade, and that he remained in the Dominion of Canada, going to school there, until the age of approximately 15 years, at which time he entered the United States at the port of entry of Detroit, Michigan, and has since then been in the United States.

I don't know whether you are interested in the fact that he made a couple of visits home to Canada. I don't think that is material. And he has been a resident alien of the United [186] States during all the times mentioned in the indictment.

Mr. Tolin: Yes, except for short temporary absences.

Mr. Christensen: Except for the short temporary absences.

Mr. Tolin: I will accept the stipulation, it is along the lines which we have previously discussed with your Honor, and I will stipulate that it may be deemed to have been made prior to the time that the government rested, and prior to the time that the court ruled upon the several motions which were before the court, in order that Mr. Christensen need not renew the motions now.

Mr. Christensen: That is all right. It will be so stipulated.

I presume for the record now we should then let the record show that the defense rests, as it does not feel any need of offering any evidence in this case.

The Court: Very well.

Mr. Christensen: Should we now also have a stipulation that it will be considered that the dis-

cussions with reference to the instructions and the proceedings in that regard—that this resting of our defense has preceded that proceeding?

Mr. Tolin: Yes, I so stipulate. I think it was informally indicated, but it will get into the record. We so stipulate.

The Court: You may proceed. [187]

(Whereupon, Mr. Tolin made the opening argument to the jury on behalf of the plaintiff.)

(Whereupon, Mr. Christensen made an argument to the jury on behalf of the defendant.)

(Whereupon, at 12:20 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day, when the following proceedings were had:)

(Whereupon, Mr. Neeb made an argument to the jury on behalf of the defendant.)

(Whereupon, Mr. Tolin made the closing argument to the jury on behalf of the plaintiff.)

The Court: We will have our afternoon recess at this time. Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon, the jury was instructed by the court and retired to deliberate.) [188]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the

above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of August A.D., 1949.

/s/ SAMUEL GOLDSTEIN,

Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

Opening Argument on Behalf of the Plaintiff

Mr. Tolin: May it please the court and gentlemen of the defense and members of the jury. It now becomes my duty to do what they call summing up the case—summing it up for you.

The case is a simple one. It is before you on evidence on which there is no conflict. Witnesses A, B and C, and so on, all of the witnesses have given a mass of testimony to you which is harmonious, so you have no conflict to resolve.

While one witness testified to one point and another to another and in some instances two or three to the same, no witness is contradicted by any other witness or stipulation or bit of evidence, documentary or otherwise.

Perhaps there is no way in which to sum up a case which is more helpful than to go again into the papers of the case which are so clearly before the lawyers as they present the case, but which don't reach the jury very frequently.

I think you heard the charge summarized. Let me read to you one of these counts because if you believe beyond a reasonable doubt that the defendant did these things then he is guilty. If you don't believe beyond a reasonable doubt that he did then he is not guilty and it is of these things only with which we are concerned.

You are a fact-finding body—in a sense a committee of citizens brought here to hear the dispute, to decide what the facts are. The judge gives you the law and upon your conviction [188-c] the judge disposes of the case.

You have only one function to do and that is to determine the facts and then only three questions to answer. As to Count 1 guilty or not guilty, as to Count 2 guilty or not guilty and as to Count 3 guilty or not guilty.

Now, one of the charges—they are all drawn in the same language because each one is the same type of crime and each one is like the other except as to dates and places at which it was committed and the names of the persons to whom statements were made.

Count 1 charges: "On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, false and fraudulently represent to Thomas A. Cox, an employee of the police department of the city of Beverly Hills, California, said Thomas A. Cox be-

ing a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

Then there is a Count 3 in the same indictment which contains the same language about the charge but says that it [189] was on or about May 25, 1944, and the statement was made to J. E. Siu, a deputy sheriff of the County of Los Angeles.

Except for those dates and the name of Siu and the insertion of the “Sheriff’s Department” instead of the police department of Beverly Hills, the count is the same as Count 1.

Now you notice that I skipped from Count 1 to Count 3. For technical reasons Count 2 was re-drafted and it is before you in a separate indictment but it follows the same language with the exception that it states, instead of giving the name of any peace officer, it states, “The Los Angeles Police Department, a department and agency of the State of California.”

The reason that it does that is because that was one instance in which the representation was one in writing. And you might be interested to look at that which I pass to you and which is an exhibit in the case.

In the other instances people heard what was said but in that instance the defendant signed it and it

became and still is a record of the police department of the city of Los Angeles.

Now, I have told you the charge, but the charge is broken down into several different elements. It says that:

“On or about June 21, 1947, in the County of Los Angeles.”

We all know Beverly Hills is in Los Angeles County.

“State of California and within the Central Division of [190] the Southern District of California.

If we were in any other division we would be before a jury there instead of here.

“The defendant, Aaron Smehoff, alias Allen Smiley, knowingly, willfully, falsely and fraudulently represented to Thomas A. Cox that he, the defendant, was a citizen of the United States.”

Did he make such representation to Mr. Cox? The transcript bears out that he did. That is page 75, counsel.

After stating that the defendant was there under arrest at that police station in Beverly Hills Mr. Cox was questioned:

“I will ask you then, Mr. Cox, did you ask the defendant Smiley any question at that time?

“A. Yes.”

“Q. And did he give you certain answers?

“A. Yes, he did.”

And then Mr. Christensen stated, in order to shorten the matter as to the questions that were asked with reference to residence and birth and so

on, there would be no objection to it going into the record subject only to an objection that it is immaterial and irrelevant, and then after more colloquy along that line it was agreed that I should read the portions of the arrest report I held in my hand and it stated:

“Person arrested: Smiley, Allen. [191]

“Residence address: 1220 Sunset Plaza Drive, Los Angeles, California.

“Phone: Crestview 19145.”

Now, “person arrested,” we agreed a little later on in this transcript was placed there by the officer as his notation; that the residence address was given by Mr. Smiley and the date was placed there by the officer of his own volition.

Then Mr. Smiley was asked:

“Hair,” and the answer “gray.”

“Eyes,” answer “blue.”

“Height,” answer “5 feet 11.”

“Weight,” answer “170.”

“Age,” answer “39.”

“Complexion,” answer “ruddy.”

“Build,” answer “medium.”

“Descent,” answer “Jewish.”

“Nationality,” answer “American.”

“Where born,” answer “New York, N. Y.”

“Date born,” answer “1-10-8.”

“Time in county,” answer “20 years.”

“State,” answer “20 years.”

“U. S. A.,” answer “life.”

Now, is that a representation of citizenship? It would certainly be. Where can there be any other explanation for it? [192]

When he was asked the question of his descent he referred to his racial background. When he was asked the question of nationality, and "nationality" is an enlargement of the word "nation." When we speak of Canadians we say "Canadians" and when we speak of citizens of Mexico we say "Mexicans." "American" is peculiarly a word referring to citizenship in this country, particularly when it is coupled with the word "nationality."

But if there could be any room for argument there, and I don't think Mr. Smiley was a subtle sort of person to be thinking in fine terms of evasion. He was thinking in plain terms of deceit. If there could, however, be any question—if you might think that he was one of these people who harp upon fine distinctions of words then he was asked where he was born and he said, "New York, N.Y."

People born in this country are citizens ordinarily. It has been stipulated that this man was an alien and that people born in New York are citizens of the United States—born in this country.

Mr. Christensen: Now, that is stating a proposition of law and I dissent from that proposition of law because there are exceptions——

The Court: That is true.

Mr. Christensen: Indians for years were not citizens.

Mr. Tolin: I will concede that for years Indians were [193] not although I think they are now. I will also concede further, Mr. Christensen, to round it out, that persons who are the children of diplomats of foreign countries born here at the consulate and the like of course would not be citizens of this country. They would be citizens following the nationality of their parents who are here in the diplomatic service.

Mr. Christensen: And having been born abroad and repatriated, but that is something we shouldn't argue here. Counsel's statement wasn't exact is why I had to interpose, and I am sorry. I hope I don't have to do it again.

[Mr. Tolin:]

Well, members of the jury, it does seem that in the face of the stipulation that Mr. Smiley is not a citizen, and there is no reason here to talk about the children of members of the diplomatic service of other countries or American Indians, that he was born in New York, is a man standing under a most serious situation.

If someone had been murdered and this man was in custody and there in the police station and he answered a series of identification questions——

Mr. Christensen: Now, if the court please, that is going way beyond the record again. The only thing that appears in the record is what he said in his opening statement, which the record shows, and that was on a specific occasion they interrogated certain individuals out there and he was held as a witness and was released the next morning. There

isn't any [194] evidence as to what actually transpired.

The Court: I think the record shows he was merely held for investigation. That is my recollection of it.

Mr. Tolin: Yes.

Mr. Christensen: And there is no evidence of anybody being murdered. Starting to talk about these collaterals I don't think is helpful at all to the basic issues and is prejudicial.

Mr. Tolin: Let us say that Mr. Smiley was before the booking officer of the Beverly Hills police station under most serious circumstances. He was held on suspicion of something and he was asked these identification questions: "Nationality—American. Where born?" And the answer was: "New York." It was this nation, America, to which he was referring.

When asked where he was born he said "New York."

When he was asked when he was born he said, "1908," and when asked how long he had been here he answered "For life."

Well, if he had been here from 1908, at the time he was born in New York, down to the time at which he told the officer that, or made that statement and said he was an American citizen, you are not going to think when you look at the report that the officer wrote down, when he transcribed his answers onto paper, that he was telling them that he was a Canadian citizen or a citizen of Russia. You are going

to [195] take it that he means he was a citizen of this country.

So we have the representation with only the one meaning that can be placed upon it. Having that in mind, let us look at the other elements involved.

It would appear from the indictment that the statement was made knowingly. Of course if Mr. Smiley thought that he was a citizen of the United States, that he was an American citizen and he wasn't, we would not be in very good grace here asking that he be indicted because this is a crime which carries with it the consciousness of doing the thing that is denounced. If he thought he was a citizen we would not be here, but did he think he was? Take a look at Exhibit 1. Exhibit 1 is for the most part an undated document but there is an insert in it on a different type of paper which is dated January 20, 1948. It doesn't seem to have much to do with this but it was left here. It has his signature on it and this was an application for registry under the Nationality Act of 1940 filed with the Immigration Service and in it he says, "My nationality is Canadian or Russian." [196]

He doesn't say Canada or Russia or United States. He doesn't equivocate at all as to United States being there. He isn't sure whether it is Canadian or Russian, and that is an understandable thing, that a person who moved from one country to another as a little boy might not know of which country he was a citizen. But he knew he was a citizen of one or the other, and he said so.

Then there is a document in the record which is dated beyond all question. It was a sworn statement. Allen Smiley. It says: "Affidavit for persons 14 years of age and older. I have read the above statements, and do hereby swear that these statements are true and complete to the best of my knowledge and belief. Allen Smiley." His signature. "Subscribed and sworn to before me at the place and on the date here designated by the official stamp below. Perley B. Dunn, Special Inspector," and the stamp immediately below it says, "October 1, 1945."

What does that document say? It is one signed by him, sworn to by him, and in it he says that his name is Aaron Smehoff, that he entered this country under the name of Allen Smiley, that he has also been known under the name of Abraham Smickoff, that he lives in Hollywood, that he was born on January 10, 1907, and as of that time he had no uncertainty where he was born, because he says, "I was born in (or near) Belitza, Russia. I am a citizen or subject of [197] Canada."

Now, a man who goes about, apparently—I don't know what the connection of this document is, and Mr. Christensen says it is well to stay out of collaterals, but it looks like something that is part of naturalization proceedings.

Mr. Christensen: I didn't hear that.

(The record was read by the reporter.)

Mr. Tolin: Referring to Exhibit 1. I don't know

what it is. We will leave it at that. The jury can tell from looking at the document itself.

A juror says would it be possible to read it later; that if he reads it now it will take his mind off what is being said. So I won't pass it.

I do not contend this man ever made an application for naturalization, Mr. Christensen. I don't know what the significance of this Immigration and Naturalization proceeding is, of this oath. It isn't an oath. It is a signed statement that was filed under the Nationality Act of 1940.

The other one is quite clear as to what it is, Exhibit 2. That is the Alien Registration form that was required to be made at the outset of the late war by persons who were in this country at that time and who were not citizens of this country. That appears from the instrument. That was a required document.

In these documents he says, in one instance, he was a [198] citizen of Canada or Russia, he knows not which, and in the other one he is a citizen of Canada. And in one that he was born in or near Belitza, Russia, and in the other that he was born in a village in Russia, the name unknown. Doesn't that supply pretty clearly the element that he knowingly was false when he told Officer Cox that he was born in New York and lived in this country all his life, and that his nationality was American?

Then there comes this element: “* * * said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, * * *”

Well, did he?

The record doesn't seem to leave any doubt. There is no contradiction of Mr. Hood's testimony. There is no contradiction of Mr. Cox's testimony.

As to the other counts, there is no contradiction of Officer Siu of the Sheriff's department, or of Officer Harper of the City Police Department of this city, or of Lieutenant Cunningham of the Police Department, or Deputy Sheriff Becker.

What do these people have to say that would show whether or not there was any relevance, whether or not it was a serious type of situation, or whether it was an idle boast or jest?—for we wouldn't prosecute him for an idle boast or jest made under conditions of levity in a joke. Federal courts are places where you get prosecuted for serious [199] statements. There are few times that are more serious to men at the moment when they are experiencing them than the time when a police officer has you in the booking room of the jail, charged with something. Ordinarily you are going to have to post bond to get out. Sometimes you can't get out even that way. You are in jeopardy; you are going to be brought before the judge, perhaps the jury; you are in danger of losing, perhaps, for a longer time your liberty. At the moment you have lost it, you are there, the jailer has you, you are being asked questions, it is a serious proposition. But it is the beginning, not the end of the case. People are booked at the jail, and then the wheels start to turn. The prosecuting officers review the evi-

dence and determine whether they are going to file a complaint or information, or present it to the grand jury. Informations or complaints are filed; the man is arraigned, bail is fixed, he goes out on bail in most cases if he is a man of any substance, and this man was able to succeed to the expensive apartment that Lana Turner used to live in, Mr. Christensen brought out, so he would ordinarily be able to make bail. Out they go on bail. Then they come in and have to enter a plea of guilty or not guilty. If they say "Guilty," then there is the time that elapses while probation officers make their report. The man comes back for sentence, and that is what they used to call in the Scotch law books the terrible day of judgment, or the dread day [200] of judgment. And it is because, even if it is a small offense, no one likes to go to jail.

And if he pleads "Not guilty," then there is the trial and he has to go through that and wait while the jury makes its deliberations. And if they convict him, he has to enter, then, into the possibility that the court is going to either take away for some time his liberty or place him under the restraining, limiting life of one on probation. He has to behave under particular rules, or have taken away some of his money by fine.

So it is the beginning of a serious process.

What of a prudent police officer who is going to book a man and get the identification material for that man?

Everyone has heard of men jumping bail. What happens when they jump bail? Well, the bail is forfeited, a bench warrant is issued, and out goes the Sheriff or officer to look for him. So they want to know does this fellow have blue eyes, about how heavy is he, all of those things. And Mr. Hood of the F.B.I. said it is most helpful to have this information concerning the nationality of the man, because when you go out to look for him you don't run around in the streets asking people to give you their fingerprints and stand by while you compare them. You go into neighborhoods where people belong to societies or groups, or where they have their friends, and you start making inquiries, and these things about a man's [201] antecedents, and the like, are important. So the Police Department had good occasion to inquire for its own use. And beyond that good occasion to inquire, there is a Federal Bureau of Investigation with its central office in Washington, and that office gets a fingerprint record and gets a report of what the answers were to these questions, and it goes into a central file, because that office is sometimes called upon to search for fugitives. That office is called upon to investigate many people for many things. And when a person is arrested, it is up to that office to accumulate as great a file of identification material as it can.

So this information is relayed on there, and then, if the subject arrested is an alien, it might be—I don't say in this case that it was, that Mr. Smiley

had an application for citizenship, for we have no evidence that he ever applied, and I will not contend that he did—but it might be that he would have a petition pending for naturalization. How serious it is to a man who is going down there taking these examinations as to citizenship and bringing in witnesses to prove good moral character, how serious would it be for the immigration officer on that case to get a call from the Beverly Hills Police Department saying, “We have a man here who says he is a citizen of such and such a country; he is arrested.”

Of course it wouldn't mean that he would be denied citizenship, necessarily, but it would alert the Immigration [202] and Naturalization Service to look into that fellow a little bit.

When people are before the Immigration Service on any of the other matters, that Service has the duty of determining the right of the alien to remain in the United States. It is the office which arranges deportation matters.

Suppose that that office were considering the subject of Mr. Smiley, or Mr. Smehoff's deportation, that he was a subject of inquiry here. He might be getting along famously, from his standpoint, in warding off whatever attacks are made, in answering whatever inquiries are made. How embarrassing it would be if, when he went down there one day, the Immigration Inspector would say, “Well, Smiley, the Deputy Sheriff has called off, the Los Angeles City Police officer called up,” or, “The

Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested," and that is what Lieutenant Cunningham said they would do if a man answered he was an alien.

But this man got the advantage of not having that done, therefore I think we have demonstrated the element that said Thomas A. Cox was a person having good reason to inquire into the nationality status of the defendant, so he could do his duty and make out the report and get it to the people who might be lawfully interested in it.

The other counts follow the same. [203]

You have the solemn duty of acting as jurors, but you also have the pleasure in store for you of listening to two celebrated defense attorneys here, Mr. Christensen, an oldtimer of the bar, once associated with Clarence Darrow for years, and Mr. Neeb, presently associated with Mr. Giesler. They are tops in presentation. I do hope they will argue to you the elements of the case. Oratory can become spellbinding, but this is a serious matter, not only of entertainment and being moved by emotionalism, but looking at evidence.

Just a word on these other counts, then I will relinquish the floor to these distinguished gentlemen. You will, I am sure, enjoy their matchless delivery, but I hope you will scrutinize what they say and bear in mind as they talk what these elements of the offense are.

The indictment says he did this. He says by his plea of "Not guilty" that he didn't do it. It is up to you to find out whether he did. It is that thing in the indictment that he is charged with, and not what somebody else might be charged with or some other thing that he might have done, or some result that might prove you can convict him. The charge is he, knowing he was not a citizen, said he was to someone who had a good reason to inquire.

We have then the Los Angeles Police Department count, where I have handed you this morning the defendant's written [204] statement.

We have the Beverly Hills Police Department count, in which I have read you what Mr. Christensen stipulated was asked by the officer.

There remains the count concerning Mr. Siu. Mr. Siu, an officer of the Los Angeles Sheriff's Department, made an arrest of the defendant, and what the defendant said to Mr. Siu, Mr. Siu wrote it down on his record: "Years lived in county—18 years. State—18 years. U.S.—Life."

Then Mr. Siu turned him over to his associate, the record deputy, who finished filling in the form, stood there at a typewriter and asked the questions and wrote the answers as given by the defendant. It was all part of that one transaction, and it says: "Race"—I can't read that, it is too obscure here, but you with good eyes on the jury, some of you probably read it. But the birthplace is very clear. "New York City, N.Y." "U.S. citizen" is very clear. It says "Yes."

There isn't any question about the facts. The defendant made those statements. The defendant was in jeopardy. If the Immigration Service knew about those statements there might be trouble. He didn't want them to know that he was in trouble. True, he had told them he was an alien. The law said he had to. Being an alien here, he had to go down to register under the law that was prevailing at that time. He [205] told them he was an alien; not that he was doing whatever it was that led him thrice to law-enforcement officers, who were people who would tell Immigration if they knew that Smiley was an alien.

Thank you.

The Court: We might have a five-minute recess at this time.

Mr. Christensen: Thank you, your Honor.

The Court: Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon, an argument was made to the jury on behalf of the defendant, which argument was reported by the court reporter but not transcribed.)

Closing Argument On Behalf Of The Plaintiff

Mr. Tolin: If the Court please, Mr. Christensen, Mr. Neeb, and members of the jury. Mr. Christensen and Mr. Neeb have performed largely as I told you I thought they would, seeing that I have been hearing them for years. Over the last eight years Mr. Christensen is always shocked by the proposi-

tion, Mr. Neeb is always ashamed of the prosecution, and the decadent nations that have fallen aside are always brought up. But the indictment is not very frequently mentioned.

We have talked about a lot of things here, so many things, at considerable length, and so loudly, I suppose on the theory that what is spurious gains some integrity if you shout it. [206]

I wonder if, perhaps, Mr. Christensen and Mr. Neeb haven't been reading Dr. Conant's, of Harvard, book about the law of probabilities, written in the field of mathematics. I have some intellectual friends who have, although I can't go into some fields like they have. In that book there is a little jingle:

There was once a learned baboon
Who insisted upon playing a bassoon,
He said, "It is perfectly clear
If I play this a year
I will sometime hit on a tune."

And so counsel have played their bassoon hoping to hit something which would have some appeal, but it is all rather discordant with what the issues of the case are.

It is the issues of the case with which we are concerned.

Of course, if you think the defendant isn't guilty, you should let him go. We don't want innocent people convicted.

If we have made a mistake and presented the

wrong matter to the Grand Jury, by all means call us down on it and bring in a proper verdict.

But, also, if this man is guilty, do that duty too, say that he is.

Mr. Neeb has referred to his four S's. He always does that. It sounds about the same, whether he is trying one type of case or another, and it is a stock line, so it comes out. [207] But what possible place has it in this case? Where is there any speculation? Mr. Christensen stood up here and said that he stipulated the defendant was an alien, so you are not asked to speculate about that, or to suspect about it, or surmise about it, or to suppose about it. It just isn't in issue.

As to the statements that were made to these officers, no one has contradicted those officers. In fact, when we got going on the trial and got down to the third officer to whom these statements were made, counsel stipulated to that. So we have no speculation, surmise, suspicion or supposition as to what was said.

As to whether Mr. Smiley might have thought he was a Canadian citizen, that was brought to you by the device of saying: Well, perhaps one of you people might have a daughter who would go up to Canada and marry someone and get confused about citizenship when being questioned by a policeman.

Mr. Smiley in the exhibits before you has stated under oath that he was a citizen of Russia or Canada. He had no confusion. There isn't any

evidence here that he had any confusion. And the fact that some police officer in his individualistic style up in Fresno got out—what was it?—some of those antiquated things that Mr. Christensen talked about, some instrument of torture, what does that have to do with this case? No one contends here that Mr. Smiley was [208] under any torture, or that he was coerced, or that he was intimidated. There isn't a suggestion anywhere in this record that he hesitated to answer the questions. If he didn't want to answer the questions, he could have stood on his right to refuse, if he had that right. But he answered. He never came to the place where he would find out what would happen to a man who didn't answer. He never got that far. He answered. And he went out of his way. Knowing that he had not been born in New York, he said he had been. Knowing that he had not been in this country all his life, he said he had been. Knowing that he was an alien, he said he was a citizen.

It seems to me it would have been much simpler to have told the truth. Why wouldn't a man?

Counsel, of course, say to you that he had been shooting dice. They refer to one instance in which Mr. Christensen jumped up and made some suggestion that maybe I would stipulate about something or other in connection with that offense. But what ever comes into the background of these offenses otherwise, whenever it comes beyond those dice and that one offense, you start hearing about collateral issues, "Let's not go into them." He

started saying, "Let's not go into collateral issues." That is all right with me not to go into them, because we are not trying him here for anything except the three offenses that are set forth in this indictment.

I went over that with you this morning and matched the evidence up to those offenses. [209]

I thought I did it so that even Mr. Christensen, who has the great capacity for misunderstanding, would get it and I suppose he did understand but, as he says, he has a duty to bring forth everything he can on behalf of his client, so he got up here and because he didn't understand me, and it might have been my fault because I kept my voice down, kind of talking to you, or because of his duty to try and get this defendant off, he and his colleague have come up here and distorted entirely the explanation I gave to you which is a clear one and one that you probably have arrived at yourself as to why this was a—why these officers when they asked the questions were people who had a reason to inquire.

He says that when Smiley was arrested on these occasions he didn't have to answer; that a man has a constitutional right not to incriminate himself; that when you people, he suggests, might someday be in a police station that the best thing you can do is not talk about whatever it is charged with.

Well, Mr. Christensen misconceives entirely the booking transaction which are the gist of this case, of these three crimes.

Seven peace officers have testified here. Has it occurred to you that only one of those officers was an arresting officer? That was Officer Siu. He went out and made [210] the arrest, and the count that we call the "Deputy Sheriff Siu Count" rests upon the testimony of Deputy Sheriff Siu and someone else.

Who was the other man? Was he an arresting officer? No, he wasn't. Neither he nor any of the other six were. They were not the officers who were investigating the crime at all.

Certainly it makes no difference, I will agree with Messrs. Neeb and Christensen on one thing, it makes no difference whether a gambler be an alien or a citizen. It makes no difference whatsoever whether a robber be an alien or a citizen. They have offended against the laws that prohibit certain things.

But the investigation of the offense when a prisoner is brought in is the one that falls to the arresting officer or to the investigating officer. It doesn't fall to the clerk at the desk. The clerk at the desk has a separate and distinct duty.

Officer Ecker said that he was assigned to the records and communications division. He had no part in the arrest. He first saw the defendant when he came in to be booked.

Milton H. Hopkins said that he was the senior clerk in the Los Angeles County sheriff's department and that as such he booked prisoners.

Morton L. McIntyre said, "I am the identification officer [211] at the Beverly Hills police de-

partment. I had nothing to do with this arrest.”

Officer Cunningham said that he was with the record and identification division and the arresting officer in that case was not even brought in here. We don't know what was said to them. Perhaps it would have made no difference because they were investigating whatever that undisclosed crime was for which they had booked this man, or for which they had brought him in, rather, to the identification bureau to be booked.

Officer Harper said when I asked him: “Were you the arresting officer,” he said he did not make the arrest.

I said, “Well, what was your part in the transaction,” and he said, “I was the booking officer.”

Cox—I started to say “Officer Cox,” but he isn't even an officer. I said: “What was your occupation there with the police department,” and he said, “Desk clerk. I was one of the fellows who kept all of the identification records together and booked the prisoners.”

The desk clerk, the senior clerk, the record and communications division men, were not men who were pursuing the inquiry about that murder or about the crime that hasn't been described here or about the shooting of dice which has been.

They were accumulating records.

Now, Mr. Hood has been somewhat run down as a witness by [212] Mr. Neeb, who said that Hood is a person, a very fine man, but that he had no part here.

We thought that Mr. Hood, being the head of the Federal Bureau of Identification in this district, and having been with the bureau for a long time was, perhaps, the better qualified man to tell you how these records are used. And this is what he told you. I won't read it all because it covers many pages, but he said at page 102, counsel:

"From the information obtained on criminal fingerprint cards submitted to the bureau by various law-enforcement agencies we may from time to time prepare identification orders; we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask for it. We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate."

I then asked him:

"Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your bureau in the way in which you have described?"

Mr. Hood said: "It might well be in some instances. It is a pertinent part of the identification record, the same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there." [213]

Then I asked him: "Is there any central place in the United States that you know of where identification material concerning persons suspected of

crime, arrestees, and persons prosecuted, is kept?" And the witness said, "The bureau maintains those records in Washington, D. C., in its identification division."

Then I asked him: "Does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service."

You will remember that the Service was interested in Smiley and Mr. Hood came back with the answer: "At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact."

Then I asked him: "In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified," and he said, "Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card."

Well, the bureau has considerable use for that and you will note that they make referrals to the Immigration Service. [214]

There was a point made here that I told you this morning, that booking is but the start of a person who is arrested. When he is arrested he is taken in and booked. That is the beginning. And

I said then he makes bail and there is an arraignment. Then he comes back for trial and he is at liberty for a considerable period of time on bond, and if he should abscond then of course all identification information is something of vital interest to those who must look for him.

Now, counsel comes back this afternoon and distorts that. He said to you that it wouldn't make any difference to a judge in determining what bail a man was going to be put under, whether he was an alien or not, and I think that is probably right. But counsel has completely distorted what I told you this morning. I don't contend to you that it makes any difference whether a man is an alien or a citizen as to how much bail he is going to be put under, under ordinary circumstances, but it is important when a person does post bail and does go forth and leaves, the identification material that they have be accurate material so that they will know and all that they need to know or can determine in order to assist in the reaprehension of the party.

Now, Officer Cunningham testified about the use to which this information is put. He said that he was an executive of the record and identification bureau and he was asked this question: "Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States Government," and he answered, "Yes, we do. If it is

brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact."

"Q. And you give them that information?

"A. Yes, we do."

Then Mr. Christensen went into that inquiry and he said: "In the instance of Mr. Smiley here, did you advise the Naturalization and Immigration Service, Mr. Pendergast or anyone else," and the officer said, "No, I didn't."

Well, why didn't he? It would have been of the greatest interest to that department, not in order to determine whether Smiley was an alien, because they had already knew that—they had had him on the fire down there before. They had these exhibits before them. He was under a deportation proceeding. Perhaps he was trying to set up his good moral character—his obedience to law and so forth—in order to escape deportation.

In any event the Immigration Service had a case. They didn't have to look to the police to find that out. But they would be interested in knowing that he was in trouble with [216] the police.

Officer Cunningham didn't tell them and the fact that he didn't tell them meant they didn't find out and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He

got the advantage of not having immigration inspectors out inquiring what was back of this charge and this trouble he was having with the police department.

That is the fraud which counsel says will I point out. I don't know why he asks that I point it out again. I pointed it out again this morning but I mention it again because of the distortion of the argument which has been made.

Counsel has also emphasized that "falsely" means perfidiously, whatever that is, treacherously and so on. But he worked that comment in with a lot of general data to the effect that the escalators in the Federal Building are on the wrong side and that while robbers must be truthful, gamblers may lie and other matters which seem to have nothing to do with our case.

Like Mr. Neeb and Mr. Christensen, they are satisfied with the instructions of the court. You listen to them and please follow them. You will find in there that the court will comment that the word spoken must not be spoken in jest or to stop the prying of some busybody and that they must be made to a person having good reason to inquire. Who had a [217] better reason to inquire than the police department that had the duty of passing on to the Immigration Service the information as to whether or not they had an alien there who was in trouble.

After all, these police departments get their fingerprint supplies and forms from the Federal Bu-

reau of Investigation. All that is correlated together. They get information themselves from there. They are under a duty to provide this information.

Officer Cunningham came in and told you so. I asked him to bring the book of regulations——

Mr. Christensen: Now, if the court please, I am going to object to this. There is no evidence that there is any legal duty whatsoever. It is purely a matter of comity and that is as far as the evidence goes.

Counsel has ranged pretty far and I haven't wanted to interrupt on some other things that he said——

The Court: I wasn't paying any attention to him, I am sorry.

Mr. Christensen: Perhaps I shouldn't either, your Honor.

Mr. Tolin: I stand on the record. I will let the jury decide what the record shows. [218]

The time is getting on, and while I have considerable time I really have heard very little that requires an answer, so I am not going to take the rest of my time to argue to you further.

The government asks you to do your duty. If you think this evidence shows that Mr. Smiley lied to the officers, as the officers said he did, and which is not contradicted, and if you believe he knew he was a citizen of some other country, which he said he was, and no one has contradicted that statement that he made to the immigration officials in

writing, and if you believe that he intended them to think he was a citizen and thereby escape the further investigation he would have with Immigration if they knew he was an alien, then he has perfidiously, falsely brought himself into the position where the only answer to your duty is to convict him.

This matter of citizenship is a very serious one, which those of us who are born with sometimes don't appreciate as much as those of us who had to acquire it by going through the very deliberate and careful naturalization process that is made available to all aliens of good moral character. But when one becomes a citizen he does acquire certain rights which he didn't have before. As my chief, Mr. Carter, who is sitting here, always likes to say when he is talking on the value of citizenship—and a lot of organizations have him out to talk to them—when we become citizens we acquire a [219] share of stock in the largest beneficial corporation in the world, the United States. And until we have satisfied the United States, through its constituted officers, if we come from someplace else, that we are entitled to receive that share, we don't have it. The law says you can't go around saying you do. Smiley says he did. He said it under most serious circumstances, and I submit he should be convicted on all counts.

Thank you.

The Court: We will have our afternoon recess at this time. Keep in mind the court's admonition.

(A recess was taken.)

(Whereupon the jury was instructed by the court, which instructions have heretofore been transcribed and are contained in a separate volume.)

(Whereupon the jury retired to deliberate and the following proceedings were had in the absence of the jury:)

Mr. Tolin: The jury having left the courtroom, I note that there are some exhibits for identification which have not been segregated from the exhibits as a whole. I think they ought to be set aside so there will be no chance of the jury getting them.

The Clerk: That has been done, Mr. Tolin. If you wish to check them, I believe it would be better.

Mr. Tolin: I think Mr. Christensen or Mr. Neeb, for the [220] defendant, should check them.

Mr. Neeb: I have my record of them.

Mr. Tolin: Mr. Neeb, I will hand you the envelope which the Clerk has handed me.

The Court: After they are checked, you gentlemen will stipulate that the exhibits in evidence may be handed to the jury.

Mr. Tolin: That stipulation, we will make it now.

Mr. Christensen: Yes, sure.

Mr. Tolin: Those that are handed back to the Clerk after checking may go to the jury.

Mr. Christensen: Yes.

I want to express to both court and counsel the delight that I have had in the course of this trial,

and the very excellent manner in which both the court and opposition have treated me and my colleague.

Mr. Neeb: I join in that, your Honor.

The Court: It has been a great pleasure to the court, gentlemen, I assure you. And I meant no disrespect to Mr. Tolin when I stated that I did not hear all of his remarks. I did not hear all of yours either, Mr. Christensen.

(Whereupon a recess was taken until the return of the jury at 4:45 p.m., when the following proceedings were had:)

The Court: The Matron handed me Exhibit 1 that you wanted deciphered in some respect. What was that? [221]

Juror No. 7: That would be the stamp, your Honor, on the left-hand corner of that sheet.

The Court: This stamp (indicating)?

The Juror: Yes, the date of that stamp.

The Court: Well, I don't know. Can you gentlemen agree on the date that is on there?

Mr. Tolin: I think that is the one we couldn't make out earlier.

We are all of the opinion—that is, counsel are of the opinion that it is illegible.

The Court: That is the way the jury found it, evidently.

Mr. Christensen: Perhaps I should approach the bench and make this suggestion to other counsel.

The Court: All right.

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Christensen: There might be the filing of this. When it was received it must be entered in some book, and that might give the date.

The Court: Well, I don't know anything about it.

Mr. Christensen: You haven't got that information?

Mr. Tolin: I don't have the information. I don't have it.

Mr. Christensen: In other words, when you file a document there must be some entry or registration.

Mr. Tolin: I might be able to have it traced down. I don't know how long that would be, or where we would have to go to do it.

Mr. Christensen: Neither do I. But isn't it the same as, virtually, Exhibit 2?

Mr. Tolin: It is very similar; it contains practically the same information.

The Court: Do they both bear the same date?

Mr. Tolin: No, they are separate instruments.

Mr. Christensen: One would be prior, wouldn't it? In other words, the certificate is really premised upon this registration application.

Mr. Tolin: I thought that was true, but there is a rider to this, I don't know if it is a rider or it is a part of the original instrument, which bears a later date.

Mr. Christensen: Well, that is an insert. That wouldn't be the determining date on that.

Mr. Tolin: I think it is in all likelihood, and it looks as if it were, the application upon which the alien registration was given, was made. That is, one is the application for alien registration, and the other one is the registration itself.

Mr. Christensen: I am willing to stipulate that it bears some date prior to Exhibit No. 2.

Mr. Tolin: I would say it was executed on or about that [223] time, at or about that date.

Mr. Christensen: Yes, and prior to. In other words, Exhibit 2 is the certificate.

Mr. Neeb: You make an application first, but how can you stipulate as to the time?

Mr. Christensen: That is true. We might agree upon this stipulation, that the court may say to the jury that it has been stipulated that Exhibit 1 is an application which preceded the certificate, Exhibit 2, dated October 1, 1945, but as to the exact time we do not know. And then, if you can find out——

Mr. Neeb: That is about as far as we can go.

The Court: All they ask is they want that date deciphered. That was their inquiry. It is illegible.

Mr. Tolin: We have no greater power of deciphering it than they have. We might give them a glass.

The Court: Could you do it with a glass?

Mr. Tolin: I don't think so.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

The Court: Counsel are in the same quandary as the jury. They are unable to decipher the date of the stamp on the left-hand corner of Exhibit 1, so we can't help you in that respect.

Juror No. 7: If it pleases the Court, the jury would [224] like to have a printed copy of your instructions that you have given us prior to departing to the jury room, please.

Mr. Christensen: I have no objection, your Honor.

The Court: You have no objection to a transcript of the instructions being furnished?

Mr. Tolin: No.

The Court: That will be all now. When those instructions are prepared they will be delivered to you.

(Whereupon the jury retired from the courtroom.)

(Whereupon a transcript of the court's instructions to the jury was prepared by the court reporter and, after being examined by counsel, was delivered to the jury by the Bailiff.)

(Whereupon a recess was taken until 11:20 p.m., when the jury returned to the courtroom and the following proceedings were had:)

The Court: Have you agreed on a verdict?

Juror No. 7: Yes, your Honor, we have.

The Court: May I see it, please?

(The verdict was handed to the court.)

The Court: Do you want to listen to the reading of your verdict?

The Clerk: (Reading.)

“United States District Court, Southern District
of California, Central Division
No. 20069—Criminal

“UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY, Charged as AARON SME-
HOFF,
Defendant.

VERDICT

“We, the jury in the above-entitled cause, find
the defendant Allen Smiley, charged as Aaron Sme-
hoff, guilty as charged in Count 1 of the indict-
ment; and guilty as charged in Count 3 of the in-
dictment.

“Dated: July 14, 1949.

“M. N. KROOPEN,
“Foreman.”

“United States District Court, Southern District
of California, Central Division
No. 20604—Criminal

“UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALLEN SMILEY, Charged as AARON SME-
HOFF,
Defendant.

VERDICT

“We, the jury in the above-entitled cause, find the defendant Allen Smiley guilty as charged in the indictment.

“Dated: July 14, 1949.

“M. N. KROOPEN,

“Foreman.” [226]

Ladies and gentlemen of the jury, is this verdict as presented and read the verdict of each of you, so say you all?

Jurors: Yes.

The Clerk: Do you wish the jury polled?

Mr. Christensen: I certainly do.

The Court: Poll the jury.

The Clerk: Lyman Hougland, is this verdict as presented and read the verdict—is this your verdict as presented and read?

Juror Hougland: Yes, sir.

The Clerk: David Kay, are these your verdicts as presented and read?

Juror Kay: Yes, sir.

The Clerk: Carolina A. Resch, is this your verdict as presented and read?

Juror Resch: Yes, sir.

The Clerk: Clara A. Knight, is this your verdict as presented and read?

Juror Knight: Yes, it is.

The Clerk: Benjamin Kelman, is this your verdict as presented and read?

Juror Kelman: Yes.

The Clerk: Minnie Yodow, is this your verdict as presented and read?

Juror Yodow: Yes, sir. [227]

The Clerk: M. N. Kroopen, is this your verdict as presented and read?

Juror Kroopen: Yes, sir.

The Clerk: Loulella H. Rose, is this your verdict as presented and read?

Juror Rose: Yes.

The Clerk: Mable H. Folsom, is this your verdict as presented and read?

Juror Folsom: It is.

The Clerk: Theresa Drew, is this your verdict as presented and read?

Juror Drew: Yes, it is.

The Clerk: Margaret S. Pierce, is this your verdict as presented and read?

Juror Pierce: It is.

The Clerk: Wm. H. Klein, is this your verdict as presented and read?

Juror Klein: Yes, sir.

The Court: You may record the verdict.

Sentence will be imposed in this case on Monday, the 25th of July, at 10:00 o'clock.

The defendant is on bond. That bond may continue in effect until that day.

Mr. Christensen: Thank you, your Honor.

The Court: Now, when should this jury report?

The Clerk: When notified, your Honor.

The Court: You are excused until further notified.

Court will stand at recess.

Mr. Tolin: Is the Probation Department to render a pre-sentence report?

The Court: Yes, the matter will be referred to the Probation Department.

Mr. Christensen: Very well, your Honor. [229]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of August, A.D. 1949.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

Monday, August 1, 1949, 10:00 A.M.

(Other court matters.)

The Clerk: No. 20069 Criminal, U. S. A. v. Allen Smiley, charged as Aaron Smehoff. Hearing motion of defendant for new trial, and motion of defendant in arrest of judgment; sentence on counts 1 and 3; disposition of count 2. Count 4 heretofore dismissed.

Mr. Christensen: If your Honor please, since we have discussed at length the legal questions both on the motion for directed verdict, as well as in the consideration of the proposed instructions, I am not going to be prolix and lengthy in arguing a motion in arrest of judgment and a motion for a new trial. For the further reason that the facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers, as well as the Police Department in Beverly Hills, that he was asked certain questions with reference to his birth, and I think in two instances as to whether he was a citizen he responded "Yes," and those were undisputed. It was for that reason, your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, as he did precisely testify under oath that he was an alien when he was before the federal officials [3*] who had the right to inquire, and he then told them the truth. In these other instances, he was not, as we know, under oath.

I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned. There were just those two simple facts.

I mention that because I am extremely puzzled at the result, particularly in light of the law as

* Page numbering appearing at top of page of original Reporter's Transcript.

given to the jury by your Honor.

Your Honor will recall the instruction—I have them here—to the effect that the matter must be material, or, rather, the answer to the question must be material to the matter then under consideration.

That is in keeping with, of course, the *De Pratu* case.

We know, of course, that alienage didn't affect the matter of suspicion of book making, or shooting dice. No distinction was made under the law that only aliens would be subject to that offense. Both aliens and citizens alike were subject to punishment or prosecution for that offense.

And it brings to thought the opinion that I cited to your Honor by Judge Hall, that while one may have a reason, or a good reason, in one's own mind, for asking certain questions, whether it be about citizenship, birth, marital status, political affiliation, that that is not what we are talking [4] about. The reason must be one that produces a given result. In other words, it is the result of the answer that counts.

Well, that, of course, is directly in keeping with the opinion in the *De Pratu* case.

I could review these instructions on end, but your Honor has them undoubtedly in mind. However, for fear that I may be challenged in not having perhaps done my full duty, I am only going to spend a minute or two in a sort of a brief refresher. For instance, the court instructed—I am reading from the stenographic report:

“Before you can convict the defendant you must further find beyond a reasonable doubt that the person inquiring concerning the nationality status of defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.”

In the application of that instruction the verdict is illogical. It is repugnant to that instruction.

Again, your Honor instructed:

“As applied to this case, ‘fraudulent purpose’ means that such representation was not only knowingly false and due to willfulness, but was made with intent to deceive such persons as to a material matter.” Who was that? A peace officer. But what was the [5] material matter?

Again there was no distinction made between whether one was an alien or one was a citizen.

Now, there are other instructions, but I am not going to proceed to read those. Your Honor undoubtedly has a recollection of those since I have pointed out two of the salient ones, and that should function, and undoubtedly will, as a reminder of the rest of the instructions.

I cannot help but again advert to the *De Pratu* case. There is something that was not before your Honor in the previous discussion. I have since then obtained the record and the briefs upon which the opinion was written. That is illuminating, as well

as, I think, a matter that will clarify some of the things that are contained in the opinion.

Now, the government argued in that case that:

“We are quite content with the interpretation in *United States v. Achtner*. The only requirement, as we understand it, is that the indictment disclose and the proof establish that the false claim of citizenship was not made in jest of empty boasting, but was made seriously to a person having a right to inquire.”

“A right to inquire” doesn’t mean just a casual right to inquire, but a right depending upon the result of the answer. In other words, all of these cases, every one of them, either [6] dealt with one applying for, let’s say, a saloon license—and the law required, as in this case, the *De Pratu* case, that he be a citizen—or that he be a citizen before he could vote. So one registers, one signs and answers questions in the form in connection with a poll tax which qualifies them, or it has been in connection with an application for citizenship. There they had the right, because the result, namely, the issuance of the license, or perhaps a conclusion as to whether or not one should become a citizen—or, even in the case of private employment, because of security purposes, an employer has an absolute right to know because you are obtaining something, there is a result. In this instance there could have been no adverse result, nothing gained by the police officer, anyone whatsoever, because it must be ma-

terial to that particular thing then under consideration.

So, as they argued in that case, it must be made seriously to a person having a right to inquire.

Proceeding further, they say at page 8:

“Counts 1 and 2, identical except for the date, allege that the claim of citizenship as made ‘in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board.’ This is certainly a compliance with the rule that the statement was deliberately and seriously made in answer to a question propounded by one who had a right to ask it.”

Or like when you go before the Radio Commission you can't get a license as a radio operator unless you are a citizen, so they have the right. And if I should obtain one, and I happen to be an alien, there is a result which is contrary to law and I gain an advantage.

There is the thesis of the government in the De Pratu case, and that may, perhaps, enlighten us a little further with respect to the wording used in the opinion.

I have read this before. It is not long.

“Appellant also contends in effect that the charges and proofs do not sufficiently show that his claims of United States citizenship were material to the transactions at hand * * *.”

They must be material to the transactions at hand, and that is in keeping with the thesis in the government's brief.

“and were not mere boastful or jesting assertions. But the first two counts charge and the undisputed evidence establishes that the allegedly false claims of citizenship were made in appellant’s applications for a Montana liquor license filed with the Montana Liquor Control Board. At the time of such filing, no one but a citizen was eligible for a liquor license under Montana law.”

The court says then:

“In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official authority and duty.”

That, of course, is an argument both that the verdict of the jury was contrary to the evidence and repugnant to your Honor’s instructions, and also supports, under the state of the evidence here, the motion in arrest of judgment.

The indictment itself was not the detailed one that you found in the *De Pratu* case, because there they affirmatively pleaded that he gave an answer in connection with an application for a liquor license, when the law required one to be a citizen. And that was showing that there was a purpose and a motive. But in this instance there could be neither purpose nor motive, because nothing could be accomplished.

And it is the matter at hand, the transaction had, as under the *De Pratu* case.

To meet the situation, counsel of course argued—and I must refer to that tenuous and specious argument, Mr. Tolin—he said, “Certainly he ad-

mitted under oath that he was a non-citizen and an alien to the immigration authorities," and that they knew about this.

In fact, we do know, your Honor, from the testimony of Mr. Hamilton, that the deportation warrant was served in about September, I think, of 1945, and also that the matter [9] had been under investigation from two to four years previous to that, so they were fully aware of his non-citizenship status.

But he says they did know that, and he doesn't contend that that affected it. But he does say, for instance, on page 203—this is the remoteness of the argument, it has nothing to do with the transaction at hand—that perhaps speculatively it might have had something of value in it and something gainful for the reason that the immigration authorities would then have known that he had been arrested for book making, and also for shooting dice.

I have taken the trouble, your Honor, to examine the press as of that time, and since he had the misfortune of newspaper notoriety, which perhaps is his greatest crime, he got publicity then, so he couldn't have accomplished anything with photographers, as one witness testified, and many newspaper men in the booking room. That was in connection with one of the arrests. I think that was the one in the Sheriff's office in 1944. And we certainly know what must have happened in June at the instance of his interrogation and being held in protective custody at Beverly Hills where he even

suffered, himself, a shot, and of course it isn't in evidence here, but, in other words, he was in the proximity of death, also, at the time. So, I have those, and I know that there was publicity at that time. [10]

But forgetting that phase of it, suppose there hadn't been any, the remoteness of it, your Honor, that it might have affected some future action. Well, there was nothing pending. In the De Pratu case there was.

It is pure guesswork.

Let me read the two contentions on page 203:

"How embarrassing it would be if, when he went down there one day, the Immigration inspector would say, 'Well, Smiley, the deputy sheriff has called up, the Los Angeles Police Department has called up,' or, 'the Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested,' and that is what Lieutenant Cunningham said they would do if a man answered he was an alien."

In other words, they would then get that information.

"But this man got the advantage of not having that done, * * *."

I think there is another phase of it along that line, but that is the basis of his contention that he did gain something by it.

I think at page 217 we have it again:

"Officer Cunningham didn't tell them, and the fact that he didn't tell them meant they didn't find

out, and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He got the advantage of not having Immigration inspectors out inquiring what was back of this charge and this trouble he was having with the Police Department. 'That is the fraud * * *.'

That is the tenuous and I say specious argument. There is no proof of any advantage. It is purely a speculation that he might have got it because some action might have been taken.

Now, your Honor can take judicial notice—we don't have the record before your Honor as to what the proceedings were, but under the state of the records it was one of illegal entry. Now, that was the thing immediately under consideration. There is no evidence to show that the case was in a state of any order being entered so that he might then come in with an affirmative application. And to get a pre-examination and any privileges, your Honor, of re-examination so you may leave and re-enter, you must then make an affirmative request. That is in the law. That wasn't pending. Then at that time it will go for an examination and investigation by a separate department on the question of whether he qualifies, and moral character. But not until that point is reached in those proceedings. So we have an utter vacuum as to how it could be material, other than the speculation that they may have made some inquiry, and it might personally have [12] embarrassed him before that

department. That is the basis of the argument. Undoubtedly that is the theme that the jury must have followed in the light of your Honor's instructions.

But it must be material to the then transaction under consideration.

There is another thing we might say about this, your Honor. We look at the date of these matters. Way back in 1944, 1945, at least as to two of them, they were quite antiquated, and his proceedings were proceeding from then on before the immigration authorities. I think the original serving of the warrant was approximately contemporaneous with the serving of the warrant—no, it followed it by about five months, the serving of the warrant. One was in May of '44, the other was in November, and the warrant was served, I think, early September or October of 1944.

Of course, being realistic and looking around the corners, there may be something that lies behind.

I pointed out to your Honor that it was in these specific types of cases where a result was achieved, such as employment, a gain, liquor license, voting. There isn't a single case in all the books that even hints that any such situation as this, with the seriousness of penalties that are imposed, was in mind to be reached. It was utterly immaterial, your Honor, to the transaction at hand.

We do know that the Tanderi case has that in mind, and [13] that is the one from the Seventh Circuit, 152 Fed. (2d). There one was indicted for

claiming false citizenship in connection with an employment application. He was asked, "Are you a citizen"? and he answered, "Yes." Then there was testimony that it was the policy of the Bendix not to employ aliens. In other words, you had the two elements there, so you got a result. And having that in mind all the time and applying it here, well, of course, the evidence does not fit the decisions.

Then, of course, you have the famous *Achtner* case in which Learned Hand participated, in which he said:

"But we agree with the district court that the representation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining defendant's citizenship
* * *."

Then they proceed to interpret the word "falsely" and they say that it must be "more than a mere untruth," and that it must be "perfidiously" or "treacherously" or "with intent to defraud."

None of those factors could possibly occur under the state of the evidence in this case.

I am not unmindful of the attitude of the courts in disposing of cases of this kind. The *Frederick* case, I called your Honor's attention to, and in that one the court made the observation, where the man went in and asked for the poll tax [14] form and signed it so he could qualify himself as a voter—that was a material matter—the appellate court affirmed, and that language your Honor recalls I read in the argument on the motion for a

directed verdict, and while they affirmed the case the court said as to the \$500.00 fine and 60-day sentence, that they affirmed without prejudice to filing a petition in the District Court for suspension of the 60-day sentence.

I know that the defendant here has been active in two types of business. I have had occasion to see a few of the letters that were filed with the Probation Department in connection with the pre-sentence report. I know he has been interested in certain activities in Texas in the oil business. I also know, if it were not for the pending of this litigation, that long before this he would have been domiciled in Texas, actively engaged in the oil business. His associate in the oil business, Mr. Josey, I think came into the city here, and I have ascertained something about the business, that they are in joint venture, and also that he is one of the, not minor but rather large, active oil operators in Texas.

Also, Mr. Walter Kirshner, who heads the multi-million-dollar Grayson and Robinson Stores, I know has been terrifically interested in him and has held open and available employment with him.

I know that there are many, many prominent people in various types of industry in this community and in the country, whom I also know, who have both a personal, social, and business relationship with the defendant.

I assume that many of those letters have been filed and are before your Honor.

Knowing those things, I am again more puzzled at the illogical verdict, and I have searched my brain again and again to find out how, in the face of the facts in this case, and your Honor's instructions, that we got this verdict. I could only explain it upon one theory, your Honor: the misfortune of the newspaper notoriety. And I think that commenced once when he had no part in the celebration of an orchestra leader here, and he went in there at the request of a woman and assisted in subduing the situation, and in consequence a lot of publicity inured.

I submit, your Honor, that on the law and the evidence in the case, and under your Honor's instructions, that the verdict is repugnant to those instructions, and not only that a motion for a new trial should be granted, but, rather, that a motion in arrest of judgment should be entered.

Mr. Tolin: If the Court please, this seems to have been a legal argument upon penalty and upon motion in arrest of judgment.

Mr. Christensen: That is what was intended.

Mr. Tolin: I was particularly interested about the splendid prospects this man has had in the oil business in Texas, and how, had it not been for the pendency of the case, he would have been right down there in Texas working in oil.

If your Honor will thumb the file, I think you will find time after time that he has come in here and asked if he couldn't leave this district because he had business interests in Las Vegas. So he got

that permission and he has gone repeatedly to Las Vegas.

Mr. Christensen: And Texas.

Mr. Tolin: Mr. Christensen says, "And Texas." But, in any event, his occupation shown by the probation report is "Gambler," and he has been principally in Las Vegas. He couldn't have been digging oil wells when he was looking out for his gambling interests there.

I don't want to take a lot of time, but Mr. Christensen is having such difficulty in determining the basis of the jury's verdict. Of course it was the jury's problem. But I should take it that the jury thought that there was a substantial right or reason to inquire.

Counsel is confused, or says he is confused, over the fact that this defendant was arrested for gambling offenses and was held in connection with the death of the individual in Beverly Hills. He says it makes no difference whether you are an alien or not, if you are a book-maker you are a [17] book-maker and you suffer the penalties of being a book-maker whether you are an alien or citizen. I think that is right. But there was no issue of whether this man was guilty of book-making or whether he was guilty of murder or whether he was guilty of gambling offenses, when he was questioned at the time he made these statements. We didn't produce a single one of the detectives who investigated those crimes respecting which this defendant was held. Those men had brought him to the jail, had turned

him over to the booking officer, and the booking officer had a separate function. He wasn't investigating the death of Mr. Siegel, nor was he investigating the book-making or the other gambling charge. He had a form to get filled out. It was for the identification records which became a part of the identification records of this subject in the master files of the F.B.I. in Washington and which are useful to the police department in determining its record of identification, and he asked the identification questions and he got the false answers, and it included this false claim to citizenship.

I know that our office doesn't bring prosecutions against people upon tips that we get out of reading the newspapers. Rather, I think the newspapers get their tips of prosecution by looking over the jail blotters. And I take it that the Immigration Service doesn't get its information as to which aliens that have deportation proceedings pending are in trouble with the police from the newspapers. They have a standing arrangement with the police to tell them whenever they catch an alien in some crime. That was what Officer Cunningham, the booking officer from the County Jail, and the Beverly Hills Police Department wanted the information for. For two purposes. Each of them had a legitimate reason to inquire, (1) so that their identification records would be complete on this man, (2) so if he were an alien they could carry out their commitment to the government to inform the Immigration Service that there was an alien in this particular trouble.

That certainly seems to fall within the language of the cases. It certainly is as serious as the case of Ledo, which we have argued in extenso here at the time of the argument for judgment of acquittal, where what Ledo did was to get himself in as president of his union on the basis that he was a citizen, and to get a pass to go across the yard of a private contractor that was doing Navy business.

I think the case has been made out, and inasmuch as a whole afternoon was spent arguing it, this morning I will submit it on these remarks, unless the court wants something more.

Mr. Christensen: Just so there is no misconception about the last case of applying for union membership. That was not this kind of a case at all. It had to do with a totally [19] different situation. It wasn't where one was indicted for claiming false citizenship under those circumstances.

Anent the oil business and Las Vegas, I think your Honor will find the fact that he was in Texas and engaged in the oil business was verified by the presentence investigation of the Probation Department. That is my recollection.

As to the question of employment. On that phase of it, I don't know whether Mr. Josey is here or not, he said he was on his way, so if there were any questions to ask either Mr. Josey or Mr. Kirshner, who is here, they are available.

I have nothing further to say to your Honor.

The Court: Very well. Stand up, Smiley.

Is there anything you would like to say before sentence is imposed on you?

The Defendant: No, your Honor.

The Court: It is the judgment of the court that you be committed to the custody of the Attorney General of the United States for a period of one year, and that you pay a fine of \$1,000.00. That is on counts 1 and 3 of Indictment 20069. The same sentence as to the one count in 20604. These sentences are to run concurrently.

Your motion for a new trial has raised a debatable question in the court's mind. I thought Mr. Tolin would share that view. So, in view of that fact, the court will admit the defendant to bail pending appeal, so that it will not be [20] necessary for you to make that application before the Circuit Court in San Francisco. Bail will be fixed in the sum of \$10,000.00.

That is all.

Mr. Christensen: May we have a stay for one day in order to arrange the bond, your Honor?

The Court: Yes, the court will release the defendant to your custody for one day.

The Clerk: How about count 2?

The Court: That was to be dismissed, wasn't it?

Mr. Tolin: Count 2 of the multiple-count indictment?

The Court: Yes.

Mr. Tolin: We dismiss it.

The Clerk: That is 20069?

Mr. Tolin: Yes.

The Clerk: How about 19778?

Mr. Christensen: That is the one with the \$5,000.00 bond.

Mr. Tolin: I will come down and dismiss it when the bond is posted.

Mr. Christensen: Under the appeal?

Mr. Tolin: Yes.

The Clerk: Will you post that today?

Mr. Christensen: Today or the first thing in the morning. [21]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of August A.D., 1949.

/s/ SAMUEL GOLDSTEIN,

Official Reporter.

/s/ J. D. AMBROSE.

[Endorsed]: Filed Sept. 21, 1949.

COURT'S INSTRUCTIONS TO THE JURY

The Court: It now becomes the court's duty, ladies and gentlemen, to instruct you as to the law that applies to this case.

Are you able to hear me?

A Juror: Yes, sir.

The Court: There are two indictments before you which have been consolidated for trial.

One of these indictments contains three counts. Count Two of that indictment has been re-drafted by the United States Attorney so that in considering the indictment which contains three counts, you will not consider the second count as it is written in that three-count indictment, but you will consider it as re-drafted in the indictment which contains but one count.

Count One of the indictment charges:

"On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been

admitted to citizenship, and was not otherwise a citizen of the United States.”

Count Three of the indictment charges:

“On or about May 25, 1944, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely and fraudulently represent to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

I have just read you the two counts remaining in the original indictment. The new indictment contains one count in which the defendant is accused as follows:

“On or about November 1, 1945, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, willfully, falsely, and fraudulently represent to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California, having good reason to inquire into the nationality status of the defendant, that he, the de-

fendant, was a citizen of the United States, whereas, in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

You will note that each of the three offenses charged is the same type of offense, that is to say, they are three separate accusations of separate alleged offenses against the same law. I will not read the pertinent portions of that law to you:

“(a) It is hereby made an offense for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not——

“ * * *

“(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.”

The word “falsely” as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it.

The failure of a defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment.

You are further instructed that throughout the trial the defendant's plea of not guilty serves as his continuing denial of the evidence offered against him by the prosecution pursuant to its ever present burden of proof.

You must clearly bear in mind that when the Court speaks of innocence, or of a circumstance being susceptible of a hypothesis of innocence, the word innocence is not used in the sense of pure, moral, free from venality, or free from wrongdoing. What is meant is innocence of the particular and specific crime charged in the indictment.

Circumstantial evidence, to warrant a conviction in a criminal case, must be of such character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by the defendant, or in other words, the facts proved must be all consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved, and be consistent with them all. If

the evidence can be reasonably reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:

1. That the defendant was not at the time of making the alleged representation a citizen of the United States.

2. That he made the representation to the person mentioned in the indictment.

3. That at the time of making said representation that the defendant then and there knew that it was false.

4. That the defendant willfully made such false representation.

5. That he fraudulently made the representation of citizenship.

6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant.

The Court instructs you with reference to the allegation in the indictment that the person to whom the alleged false representation of citizenship was made "had a good reason to inquire into the nationality status of the defendant" that the phrase "good reason to inquire" means more than any reason, or which might be deemed by such person

inquiring to be a good reason; it means as applied to this case that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship.

You are further instructed that even though you find that the defendant made a false representation of citizenship to the persons or any one of the persons named in the indictment, you must nevertheless find the defendant not guilty if you find such representation was made "as a mere boast" or "jest" or "to stop the prying of some busy-body."

You are further instructed that the word "falsely" as used in this indictment suggests more than a mere untruth and includes "perfidiously," "treacherously," or "with intent to defraud."

Before you may convict you must further find beyond a reasonable doubt that such representation was not due to surprise, inadvertence or mistake, or duress, but due to "willfulness." "Willfulness" means more than "intentional" or "voluntary"; it means done with a bad purpose, without justifiable excuse, without ground for believing it lawful.

As applied to this case, "willfulness" means that before you may convict, you must believe beyond a reasonable doubt the defendant represented that he was a citizen of the United States as alleged, and that such representation was not only knowingly false but also given with a bad purpose, without justifiable excuse, and without ground for believing it lawful.

You are instructed that to "represent oneself"

as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States.

Before you can convict the defendant you must further find beyond a reasonable doubt that the person inquiring concerning the nationality status of defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration.

Before you may convict the defendant you must further find beyond a reasonable doubt that such representation was not only knowingly false and due to willfulness, but was made for a fraudulent purpose.

As applied to this case, "fraudulent purpose" means that such representation was not only knowingly false and due to willfulness, but was made with intent to deceive such persons as to a material matter.

While it is the duty of the jurors to confer and deliberate with one another before arriving at a verdict, nevertheless, the verdict which you render must represent the real judgment and honest conclusion of each of you. If any juror after such deliberation, conscientiously reaches a decision on the facts, he has no right to surrender his decision to the opinion of the majority for the purpose of preventing a disagreement or for the purpose of arriving at a compromise.

By the finding of an indictment no presumption whatsoever arises to indicate that a defendant is

guilty, or that he has had a connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

The defendant is not called upon to produce any evidence whatsoever as to his innocence.

We are here for the purpose of trying the issues of fact that are presented by the specific charge in this indictment only and the plea of the defendant thereto. This duty you should perform uninfluenced by passion or prejudice on account of the nature of the charge against the defendant. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the court. The law will not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is

difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restate or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such a feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contra-

dictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the Government, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which

it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his own view when convinced that it is erroneous.

In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

The opinion of the judge as to the guilt or innocence of the defendant, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury; for to the jury exclusively belongs the duty of determining the facts.

The law you must accept from the court as correctly declared in these instructions.

Have I omitted anything, gentlemen?

Mr. Christensen: I think not, your Honor.

The Court: Two forms of verdict have been prepared for your guidance. Omitting the title of the court and cause, one reads:

“We the jury in the above-entitled cause find the defendant Allen Smiley, charged as Aaron Smehoff, as charged in Count One of the indictment, and as charged in Count Three of the indictment.”

The other reads:

“We the jury in the above-entitled cause find the defendant Allen Smiley as charged in the indictment.”

On those blanks you will insert whatever your finding may be, either “Guilty” or “Not Guilty.”

The guilt or innocence of the defendant as to each count must be determined separately.

After you have agreed upon a verdict you will have it signed by your foreman, whom you will select when you reach your jury room, and return into open court.

Any verdict agreed upon, of course, must be the unanimous verdict of the jury.

I think you may retire in the custody of the bailiff.

The Clerk: Shall I swear the bailiffs?

The Court: Very well. Swear the bailiffs.

(Whereupon the bailiffs were sworn.)

The Court: You may retire now.

(Whereupon the jury retired to deliberate.)

[Endorsed]: Filed Sept. 21, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain the original Indictment in case No. 20069; Motion to Dismiss in case No. 20069; Indictment in case No. 20604; Defendant's Requested Instructions; Stipulation re and Defendant's Requested Supplemental Instructions No. 8s and 9s; Verdicts in each of cases Nos. 20069 and 20604; Motion for New Trial; Motion in Arrest of Judgment; Judgment and Commitment in each of cases Nos. 20069 and 20604; Notice of Appeal; Statement of Points on Appeal; Stipulation; Designation of Record on Appeal and Order Extending Time to Docket Appeal and full, true and correct copies of Minute Orders Entered July 19, 1948 in case No. 20069, June 7, 1949, in each of cases Nos. 20069 and 20604, July 12, 1949, and August 1, 1949, in each of cases Nos. 20069 and 20604 which, together with copy of reporter's transcript of proceedings on June 7, 1949, July 12, 13, and 14, 1949, and August 1, 1949, and original plaintiff's exhibits Nos. 1 to 12, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7 day of October, A.D., 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By: /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12375. United States Court of Appeals for the Ninth Circuit. Allen Smiley, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 10, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
Ninth Circuit
No. 12375

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF POINTS TO BE RELIED
UPON APPEAL AND DESIGNATION OF
RECORD

We hereby adopt as the designation of points to be relied upon and record to be printed on appeal the Designation of Points to be Relied On and Record to be Printed, as filed with the United States District Court.

/s/ OTTO CHRISTENSEN,
Attorney for Appellant
Allen Smiley.

[Endorsed]: Filed Oct. 20, 1949.

No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

OTTO CHRISTENSEN,

ROBERT NEEB,

1212 Spring Arcade Building, Los Angeles 13,

Attorneys for Appellant.

12375

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No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT.

Statement of Basis of Jurisdiction.

This is an appeal from a judgment rendered against the appellant by the District Court of the United States for the Southern District of California, Central Division, upon a verdict finding appellant guilty of violations of U. S. C. Title 8, Sec. 746(a)(18)—falsely claiming citizenship. The charges are contained in two indictments. The first indictment (No. 20069) in count one charged a violation of said statute on or about June 21, 1947 and count three charged a violation as of May 25, 1944; the second indictment consisting of one count charged a violation as of November 1, 1945 [Indictments, R. 2, 11; Verdict, R. 34; Judgment, R. 38, 40]. The appellant was sentenced to a term of imprisonment of one year on count one of the indictment (No. 20069) and to pay a fine in the sum of

\$1,000; and, on count three of said indictment, to a term of imprisonment of one year and to pay a fine in the sum of \$1,000, said sentences of imprisonment to run concurrently [R. 39]; and to a term of imprisonment of one year and to pay a fine in the sum of \$1,000 on indictment No. 20604, said term of imprisonment to run concurrently with the sentence of imprisonment of one year imposed in case No. 20069 [R. 40].

The District Court allegedly had jurisdiction under 28 U. S. C., Sec. 41(2) and this Court has jurisdiction under 28 U. S. C., Sec. 225(a).

Thereafter the appellant duly filed his Notice of Appeal from said judgment against him within the time prescribed by law [R. 41]; and, contemporaneously therewith, appellant filed his Designation of Grounds of Appeal [R. 42].

Thereafter, appellant filed within the time prescribed by law his Designation of Record on Appeal [R. 45], and a Statement of Points on which appellant will rely on appeal, together with a designation of the parts of the record necessary for a consideration of his appeal [R. 44].

Thereafter, the record in this case, including the transcript of all of the testimony and all of the evidence, together with all of the exhibits, separately and directly certified, was filed with the Clerk of this Honorable Court, together with a Statement of Points to be relied upon on appeal [R. 281, 283, 44].

Statement of the Case.

The Indictments.

Count one of indictment No. 20069 charged the appellant with having violated subparagraph (18) of Section 746(a) of Title 8, U. S. C., as follows:

“On or about June 21, 1947 * * * Allen Smiley did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.”

The other count in indictment No. 20069, and indictment No. 20604, each charged the identical offense, however, in the instance of indictment No. 20069 the date alleged was May 25, 1944 and the person to whom the defendant so represented himself was J. E. Siu, a Deputy Sheriff of the County of Los Angeles, and in indictment No. 20604 the date is given as November 1, 1945 and that the representation was to the Los Angeles Police Department [R. 2, 11].

The appellant filed motions to dismiss the indictments which were denied [R. 4, 12, 48, 10].

The Facts in Evidence.

As to count one of indictment No. 20069, the record discloses that the appellant was held as a material witness for interrogation from late in the evening of June 21, 1947 to early in the morning of June 22, 1947 by the Beverly Hills Police Department; that on this occasion a police officer at the Beverly Hills Police Station made out a booking slip as a result of his interrogation of the appellant, which disclosed appellant's address, phone number, color of hair and eyes, height, weight, age, complexion, build, descent, nationality, place and date of birth, time in county, state and United States, and occupation. The slip stated that appellant was born in New York City, was in the county and state for twenty years and in the United States for life [R. 118, 157]. The Beverly Hills police officer testified the custom of the Beverly Hills Police Department was when a person was brought in for booking that the officer on duty would ask the questions contained on the booking slip of the person being booked, and filled in the answers on the slip [R. 115]. The above evidence was received over objection that it was irrelevant and immaterial [R. 117]. The above constitutes all of the evidence as to this count of the indictment.

As to the remaining count of indictment No. 20069, the record discloses that the appellant was arrested on May 25, 1944 by the Sheriff's office of Los Angeles County on suspicion of bookmaking and later released [R. 80, 88]. Deputy Sheriff Siu testified that on this occasion, appellant was taken by the Sheriff's men to an office on North Hill Street for the purpose of questioning him before taking him to the County Jail for booking [R. 85]; at this office six officers interrogated appellant for a period of

time before taking him to the County Jail [R. 86, 87]. The arresting officer made out an arrest slip containing the date of arrest, color of the subject's hair and eyes, weight and height [R. 81]; this arrest slip was then given to the booking office of the County Jail at the time the arrestee is booked [R. 82]; the purpose of the arrest slip is to identify the individual arrested and to show the charge [R. 89]. Another Deputy Sheriff [R. 121] testified that he was on duty in the booking office at the County Jail when Deputy Sheriff Siu brought in the appellant for booking; that he received the information contained on Government's Exhibit 5 from the appellant, in answer to questions put to him at that time [R. 122]; this exhibit reflects "the prisoner," Allen Smiley answered "yes" to the question "United States citizen;" that he asked the question "United States citizen" and that Smiley answered "yes" [R. 123]; that the booking slip [Government's Exhibit 5] was required by the Sheriff's office at the time he made it out. On cross-examination, the witness testified that this form had been in use for several years; that it was a form developed by the "sheriff himself" and that he was told to use that form in booking prisoners and that he did use it [R. 135]. Exhibit 5 concerning this incident was also objected to as irrelevant and immaterial [R. 136].

As to the third incident which is the subject of indictment No. 20604, the record discloses that on November 1, 1945, at three o'clock in the morning, the appellant together with many other persons was booked at the Lincoln Heights Jail on a local gambling charge, of which he was later acquitted by a jury [R. 100, 101, 113]; that it was the practice of the Police Department to obtain the information contained in Exhibit 9 from an arrestee at the time of his booking [R. 101]; that the booking in-

formation contained on Exhibit 12 [R. 106] was received from the appellant as a result of questioning him; that the answers to the questions on Exhibit 9 were copied from Exhibit 12 [R. 106, 107]; that the answer "yes" to the word "citizen" was the result of asking the appellant the question [R. 107]; that the appellant was asked his "age" and "time in county" and that he answered "age, 38" and "twenty years" [R. 107]. In answer to the question of whether or not the contents of Exhibit 9 "was required in the course of practice by the Police Department," the witness answered "It is an order, departmental order," that "it is a departmental order saying that you should get these * * * from anyone who is arrested;" that he was simply carrying out an order to get as much identification information as the prisoner would give [R. 109, 110]. On redirect examination, the witness testified, when asked what would happen to the arrestee if he would refuse to answer,—“if he refused to give any, we booked him as John Doe, gave him a booking number and held him until he does give the information” [R. 110]. On re-cross-examination he testified "by holding him," he means that they would put him in a cell. It was stipulated that the appellant was tried on the charge referred to in Exhibit 9 and that the jury found him not guilty [R. 109]. The objection as to materiality of this incident also was overruled [R. 113].

Aside from the foregoing, evidence relating to the existence of a policy of comity between departmental agencies in exchanging information gained from booking slips was received: The witness Cunningham testified that "As an adjunct to our finger print card furnishing additional information so that we can in the future identify a per-

son was the purpose of Exhibit 9; the information is indexed in various forms * * *.” [R. 97.] Over objection that the same was immaterial, the witness testified “that the record was available to other law enforcement agencies” [R. 97] “and that it would include the Immigration and Naturalization Service of the United States.”

The witness Hood testified that he was generally familiar with the use that the Federal Bureau of Investigation made of identification material and information taken from prisoners at various police stations and Sheriff’s offices [R. 137]. Over objection that it was irrelevant and immaterial, the witness testified that they use such information in seeking to apprehend fugitives and others for “whom we have process out for or wish to locate.” Questioned as to whether or not the information regarding nationality or citizenship was used by the Bureau, the witness answered “It might well be in some instances. It is a pertinent part of the identification record, the same as a man’s age or his height or his weight * * *” [R. 138]. Asked if the Bureau referred information concerning the arrestee to the Immigration and Naturalization Service, the witness testified “In connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact” [R. 139]; that it is necessary frequently in making a referral to the Immigration and Naturalization Service, because of a similarity of names, to give the complete summary on the identification card [R. 140]. The above testimony was given over objection that it was immaterial. On cross-examination the witness testified that the Immigration and Naturalization Service had its “own immigration records,” with reference to identification [R. 140] and that they are

available to the Federal Bureau of Investigation. That if they were interested in ascertaining whether one was an alien, they would check the records of the Immigration and Naturalization Service; that in investigating a person, they would first check their own F. B. I. records [R. 141].

The witness Cunningham recalled testified that he was familiar with the department known as the "Record and Identification Bureau of the Los Angeles Police Department." Over objection the witness was permitted to testify that they refer information to an agency of the United States other than the F. B. I. of noncitizenship "if it is brought to our attention to the arrest report that the man is an alien or an illegal entry—we call up the Department of Immigration." [R. 143, 144.] That the only information referred to the Federal Bureau of Investigation and the State at Sacramento are the finger print cards and "only the specific charge for which he was arrested at that time" [R. 145].

The defense stipulated that the witness Dunn would testify that Government Exhibit 2 for identification (Alien Registration Application dated October 25, 1945) was signed by the appellant and that the questions contained therein were asked by the witness and the answers given by the appellant [R. 149], and that they were given under oath. This exhibit disclosed that the appellant registered as an alien, disclosing that he was born in Russia and migrated at a tender age to Canada. It was stipulated that Government's Exhibit 1 for identification and Exhibit 2 for identification be received in evidence [R. 151]; the former, a naturalization document giving information concerning the appellant's alien birth.

The witness Hamilton testified he was an immigration inspector for Los Angeles; that the appellant was taken by him to Mr. Dunn's office to execute Exhibit 2 [R. 153]; that the appellant was arrested by him under a Warrant of Deportation on or about October 1, 1945 [R. 153, 154]; on cross-examination he testified that a hearing was had on the Warrant of Deportation, at which time the appellant was given an oath to truthfully answer any and all questions propounded to him [R. 155]; that the first hearing after the service of the warrant he interrogated the appellant as to citizenship; the appellant under oath on that interrogation testified that according to information received from his parents, he was born in Russia and brought to Canada as a child and that he remained in Canada until he was about fifteen years of age; that at that time appellant testified he believed he was a naturalized citizen of Canada because of his father's naturalization [R. 155, 156]; that the naturalization service had engaged in an investigation of the appellant for probably a couple of years prior to serving the Warrant of Deportation [R. 156, 157].

The appellant stipulated that he was born in some unknown town, approximately forty years ago, in Russia, and as a baby was brought to America, disembarking in the Dominion of Canada with his parents where he remained until the age of approximately fifteen years, when he entered the United States through the port of entry at Detroit, Michigan and has since been in the United States [R. 208, 209].

No witnesses were called in behalf of the appellant in his defense; in fact not only was there no denial, but virtually an admission that in addition to being a alien,

on the occasions of his interrogation by booking officers, he was asked certain questions with reference to his birth, as testified to, and in two instances as to whether he was "a citizen," he answered "yes" [R. 251].

The Issues as Submitted to the Jury by the Court.

The Court instructed the jury in the cardinal aspects of the case as follows:

(a) "The word 'falsely' as used in the indictment as describing the representation as to citizenship * * * means * * * the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it."

(b) "The allegation in the indictment that the person to whom the false representation of citizenship was made 'had a good reason to inquire into the nationality status of the defendant' that the phrase 'good reason to inquire' " means more than any reason, or which might be deemed by such person inquiring to be a good reason; it means, as applied to this case, that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship [R. 273].

(c) That before they can convict they must further find "that the person inquiring concerning the nationality status of defendant was engaging in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration." [R. 275.]

(d) "That 'to represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and to affirmatively claim to be, a citizen of the United States." [R. 274, 275.]

(e) That they must find for the defendant if such representation was made “ ‘as a mere boast’ or ‘jest’ or to ‘stop the prying of some busybody.’ ” [R. 274.]

(f) “That the word ‘falsely’ as used in this indictment suggests more than a mere untruth and includes ‘perfidiously’, ‘treacherously’ or ‘with intent to defraud.’ ” [R. 274.]

(g) That “willfulness,” as applied to this case, means that the representation of citizenship “was not only knowingly false but also given with a bad purpose, without justifiability, excuse, and without ground for believing it lawful.” [R. 274.]

(h) That before they could convict the defendant they must find beyond a reasonable doubt that the representation of citizenship “was not only knowingly false and due to willfulness, but also made ‘for a fraudulent purpose.’ ”

(i) The Court further charged that the representation of citizenship must not only be “false and due to willfulness, but also made with intent to deceive such person as to a material matter.” [R. 275.]

The appellant filed a “Motion for a New Trial” and a “Motion in Arrest of Judgment” [R. 34, 35]: “That on the law and the evidence of the case, and under your Honor’s instructions, the verdict is repugnant to those instructions, and not only that a Motion for a New Trial should be granted, but * * *, that a Motion in Arrest of Judgment should be entered.” [R. 263.]

The Court, although denying the motions, commented at the conclusion of the arguments:

“Your motion for a New Trial has raised a debatable question in the Court’s mind . . . so, in view of that fact, the Court will admit the defendant to bail pending appeal. . . .” [R. 267.]

Theory of Prosecution.

It was conceded by the prosecution that the appellant had been before the Naturalization and Immigration Service prior to the time of any of the incidents charged in the indictments and disclosed his alienage [R. 65], and the record discloses that the Naturalization and Immigration Service was fully aware of appellant's non-citizenship status prior to these incidents [R. 156]; also that as early as 1945 the appellant, under oath, had testified in a hearing conducted by the United States Naturalization and Immigration Service that he was not a citizen [R. 155], and in that year the appellant had, under oath, registered with said Service as an alien, setting forth the details of his alienage.

The theory of the prosecution was that the arrestee by failing to truthfully cooperate with a police agency in carrying out the mechanics of police administration in gathering specific types of information, could gain an advantage, *i. e.*, forsooth the interchange of this information by governmental agencies, may have resulted in incriminating the arrestee in more and further difficulties; in short, it is making an offense out of failure of an arrestee to truthfully cooperate in the execution of a policy of comity between police agencies to which the appellant was not a party [R. 187, 188, 190, 202].

It was on this precise theory that the prosecution rested its case of materiality and fraudulent purpose in its arguments to the jury [R. 225, 226, 232, 238].

We wish to point out that there was no evidence in the record showing the nature and character of the deportation charges pending against the appellant. In the absence of such showing, it can be nothing but pure speculation

that the remote information of one having been interrogated as a material witness and arrested on a local gambling charge would have been information pertinent and material to any action on the part of the Naturalization and Immigration Service. Under the immigration laws there are certain categories of charges which permit the exercise of no discretion but deportation, and in which good moral character is never an issue. Neither did the alleged changes involve elements of moral turpitude.

The Instructions Refused.

Objections and exceptions were noted to the failure of the Court to give defendant's requested instructions, No. 27 and No. 30 [R. 30, 31, 204]. These instructions deal with the principle that the defendant was under no legal requirements to answer the booking officer's question with reference to birth and citizenship.

Specifications of Error Upon Which Appellant Will Rely.

Error I:

The Court erred at the conclusion of all of the evidence in the case in not granting the defendant's Motion for Judgment of Acquittal and to dismiss on the grounds that the evidence was insufficient to establish the offense charged as to each count of Indictment No. 20069 and Indictment No. 20604 [R. 44, 162, 204].

Error II:

The Court erred in not arresting judgment and in pronouncing judgment and imposing sentence, in that the verdict of conviction was inconsistent with, contrary and repugnant to the Court's instructions [R. 45, 271, 273-275].

Error III:

The Court erred in failing to give to the jury Instructions No. 27 and No. 30 requested by the appellant, which were:

INSTRUCTION No. 27.

“Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions.” [R. 30.]

INSTRUCTION No. 30.

“Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged violation of gambling laws as to the place of such individual’s birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully.” [R. 31.]

The grounds of the exception to the Court’s failure to give these instructions were that the jury should be instructed upon the principles of law contained therein; namely, that the appellant therein at the time of being detained as a material witness or arrested for an alleged violation of

local gambling laws was not required to answer questions propounded to him by local police officers as to his birth or citizenship; or under any legal obligation to answer such questions truthfully [R. 205].

Error IV:

The Court erred in permitting testimony concerning the comity arrangements between police agencies in exchanging information concerning arrestees.

The witness, Frank Cunningham, testified that Plaintiff's Exhibit 9, a booking slip of the Los Angeles Police Department relating to the arrest of the appellant on November 1, 1945, on an alleged gambling charge, contained information as to the appellant's age, birth and citizenship [R. 97]:

"Q. Was that record available to any other law enforcement agencies than the Los Angeles Police Department? A. Yes.

Mr. Christensen: I object to that. It is irrelevant and immaterial, your Honor.

The Court: I think he may answer.

The Witness: Our records are open to all bona fide law enforcement agencies.

Q. (By Mr. Tolin): Would that include the Immigration and Naturalization Service of the United States? A. Yes, sir, it does." [R. 97-98.]

The witness, Richard B. Hood, in charge of the Los Angeles office of the Federal Bureau of Investigation, testified:

"Q. Are you familiar with the use that the Federal Bureau of Investigation makes of identification material and information taken from prisoners in

various police stations, sheriffs' offices, and the like?

A. Generally, yes.

Q. Will you tell us what that use is?

Mr. Christensen: Just a moment, Mr. Hood.

To that, I object, your Honor. It is irrelevant and immaterial, whether they make use of that or they make use of Gallup polls * * *. The question is in this case whether or not he affirmatively made a representation of citizenship that defrauded someone * * *. They may gather their information from high and wide, your Honor, and that will not show materiality in this case. It must grow out of the very essence of the thing that was being inquired into at that time, and not because of collateral reasons.

The Court: He may answer.

The Witness: From the information obtained on criminal finger print cards submitted to the Bureau by various law-enforcement agencies, we may from time to time prepare identification orders, we may on direct inquiry from a law-enforcement agency furnish them complete or summary bits of information from those identification cards if they ask it. We use it ourselves for seeking the apprehension of fugitives and others whom we have process out for or wish to locate.

Q. (By Mr. Tolin): Is the information regarding the nationality or citizenship of a subject who is reported on one of those cards used by your Bureau in the way in which you have described?

Mr. Christensen: Just a moment. I make the same objection, your Honor, and also the further objection that it is highly prejudicial.

The Court: He may answer.

The Witness: It might well be in some instances. It is a pertinent part of the identification record, the

same as a man's age or his height or his weight. Frequently it would be of tremendous value to an investigating officer if he had that information. That is why it is on there.

Q. (By Mr. Tolin): Is there any central place in the United States that you know of where identification material concerning persons suspected of crime, arrestees, and persons prosecuted, is kept?

Mr. Christensen: The same objection, your Honor.

The Court: He may answer.

The Witness: The Bureau maintains those records in Washington, D. C., in its Identification Division.

* * * [R. 137-138-139.]

Q. Do you ever determine, that is, does the Federal Bureau of Investigation ever determine, on its own motion or pursuant to law or regulation, to refer information concerning an arrestee to the Federal Bureau of Investigation? I mean to the Immigration and Naturalization Service. A. At any time in connection with our cases, when an alien receives a sentence in court, the Immigration Service is automatically advised of that fact.

Q. By your department? A. By our department.

Mr. Christensen: Just a moment. May I have the same objection without renewing it?

The Court: Yes.

Mr. Christensen: At this time I will make a motion to strike. Or may it appear as if the objection was made before the answer?

The Court: To all of the testimony of the witness.

Q. (By Mr. Tolin): In determining whether to make a referral to the Immigration and Naturalization Service, do you use the identification material respecting which you have testified? A. Frequently it is necessary, in view of similarity of names and other reasons, to give the complete summary on the identification card, on the fingerprint card." [R. 139, 140.]

Frank H. Cunningham was recalled as a witness and further testified:

"Q. (By Mr. Tolin): Does that department, when a person who is arrested gives information that he is not a citizen of the United States, does your bureau refer that information on to any agency of the United States . . . other than the F. B. I.?

Mr. Christensen: That is objected to as irrelevant and immaterial and for all the reasons ascribed to the testimony of Mr. Hood.

The Court: He may answer.

The Witness: Yes, we do, Mr. Tolin. If it is brought to our attention in the arrest report that the man is an alien or illegal entry, if some information comes to our attention that way, we call up the Department of Immigration. I believe Mr. Pendergast and Mr. Cole or Mr. Nelson are the men we generally contact.

Q. (By Mr. Tolin): And you give them that information? A. Yes, we do." [R. 143, 144.]

Error V:

The Court erred in overruling appellant's Motion to Dismiss Counts 1 and 3 of Indictment No. 20069 and Indictment No. 20604 [R. 10-12, 44-45, 48].

ARGUMENT.

I.

The Evidence Was Insufficient to Establish the Offenses Charged as to Each Count of Indictment No. 20069 and Indictment No. 20604.

Upon this record, the basic contentions of the appellant as to the insufficiency of the evidence are as follows:

That answers of an arrestee at the time of his routine booking on alleged charges of gambling, *i. e.*, "Birthplace. New York, N. Y.," "U. S. Citizen. Yes," [Exhibit 5, R. 122; Exhibit 9, R. 107], and answers at the time of an arrestee's routine booking while being held as a material witness in connection with a police investigation, *i. e.*, "Where Born. New York, N. Y.," "Time in U. S. A. Life" [R. 177], plus evidence of a comity arrangement between State and Federal authorities to exchange information disclosed by these booking forms, does not establish the charges in the indictments, for the reasons:

(a) ascertainment of the Arrestee's citizenship, in connection with an arrest under the above circumstances, was *not* "in furtherance" of the inquiring police officer's official authority and duty,

(b) the nationality status of the arrestee was wholly immaterial to the alleged gambling charges and his being held as a material witness,

(c) the above circumstances failed to establish that the arrestee represented himself to be a citizen of the United States, in that "to represent one's self" as a citizen as set forth in the indictment, means (and as charged by the trial court) to hold one's self forth as, and to affirmatively claim to be a citizen of the United States.

(d) that the above answers given by the arrestee under the circumstances of this case must be held to have been given to "stop the prying of some busy body,"

(e) regardless of how an arrestee answered the above questions (be he citizen or alien), he would have suffered the identical consequences of being charged with gambling violations and being held as a material witness; therefore, there was an absence of proof that the answers were "more than a mere untruth, but were given with intent to defraud,"

(f) under the above circumstances there was a complete absence of proof of "fraudulent purpose," *i. e.*, "made with intent to deceive * * * as to a material matter," as charged by the trial court.

The trial court recognized the gravity of the above contentions, when at the conclusion of the arguments for a new trial, and the imposition of sentence, on its own motion fixed bail and characterized the questions presented as debatable ones [R. 267]. There is, of course, no case in the books presenting any comparable fact situation. The cases of this circuit, as well as of the other circuits all involved the established elements of the right legally to inquire as to citizenship, materiality as to subject matter, deception as to a material subject matter and the perpetration of a fraud. The cases all show an affirmative action upon the part of the defendant to gain for himself something which he otherwise would not have if his alienage was truthfully disclosed. Examples are many, *i. e.*, liquor licenses, supporting testimony of good character in aid of admission of an alien employee, radio licenses, employment, etc. In all these cases citizenship was material to the transaction and subject matter under consideration; the end result would or could have been different,

depending upon whether the individual was alien or citizen. In the instant case that is not the situation. Whether the appellant here had answered otherwise than he did to the booking officers he would nevertheless have been arrested on the local violations or been held as a material witness; it in no wise could or would have changed his situation or that of his arrestors or their principals.

This record, of course, also disclosed that compulsion and duress is practiced to obtain answers to the questions contained on the booking forms. On this score the testimony is that if an arrestee declines to answer he is booked as a "John Doe," and incarcerated in a cell until he does answer the questions [R. 109, 110]. We of course know that answering even as to one's name and address may under some circumstances be incriminatory. It is conceivable that such questions as were contained on the booking forms as reflected by these Exhibits could be in each instance incriminatory. Incrimination is not limited to the immediate charge, but reaches to all possible types of charges. It is of course academic that no legal right exists on the part of police officers to interrogate an arrestee with a concomitant obligation on the arrestee's part to truthfully answer. Much information may be desirable to carry out police efficiency and it may even go so far as the ascertainment of religion, politics, employment, income, marriage and divorce status, etc., but there is no law which authorizes it. If anything, the law is to the contrary and protects the individual's privacy fully. The evidence also is that booking forms such as these were prepared by a superior officer and that the booking officer was "ordered" to use them. This, of course, is a far cry from being an official act "in furtherance of official authority and duty." A police agency may have all of the characteristic

curiosity of a Mr. Gallup or the other multitude of public survey agencies, and who, incidentally, have a lawful right to ask any questions and seek any information that they desire as distinguished from the legal right to ask in furtherance of official authority, but unless authorized by a law which imposes a duty on the questioned individual to answer, the rights of police agencies are no greater than those of any curiosity seeker.

The prosecution's case is not aided at all by testimony regarding practices of police agencies to exchange information contained in these booking forms. The appellant was not a party to them. The effect of untruthful answers upon a conjectural future collateral proceeding constitutes no legal basis for requiring truthful answers. Further, there is an utter absence of proof that if appellant's alienage had been disclosed it would remotely have affected any pending proceeding, conjectural future proceeding, or the exercise of any official discretion with respect thereto. As we have seen the plaintiff advanced the fantastic theory that if the naturalization and immigration service had known the appellant had been arrested for gambling or held as a material witness it might have either affected their action on the pending deportation proceeding or inspired their taking some other action against the appellant. This certainly reaches stratospheric altitudes of guesswork and speculation in the absence of any evidence in the record as to the nature and character of the deportation proceedings pending against the appellant. In the absence of any evidence on this score who is to judge how or in what manner gambling charges and being held as a material witness could be pertinent and material under any circumstances. Incidentally the record discloses that he was released on one gambling charge and tried and ac-

quitted on the other. Further, any generalization that it may have touched the subject of good character is wholly ineffective because in taking judicial notice of the immigration and naturalization laws we find many grounds of deportation in which the issue of good character is never involved; in these cases deportation is automatic and the law affirmatively denies the exercise of the specific statutory discretions vested in the Attorney General. Also both the character of charges on which appellant was arrested and the results exclude them as factors on any issue of good moral character. Of course, the naturalization and immigration service had been advised and knew of the non-citizenship status of the appellant, before and at the time of the incidents of his gambling arrests and being held as a material witness [R. 65, 153-156].

The trial court gave recognition to substantially all of the cardinal legal principles contended for by the appellant in his charge to the jury. The law of the case as given the jury by the trial court appears (*supra*, pp. 10, 11). Under the law of the case the jury's verdict was completely inconsistent and repugnant.

This Court in *U. S. v. De Pratu*, 171 F. 2d 75, 76, in a case involving the violation of the statute in question, was concerned with the following situation:

Each of the counts 1 and 2 of that indictment charged the defendant on a stated date made a false statement of citizenship in an application for a retail liquor license filed with the Montana Liquor Control Board by answering "Yes" to the question "Are you a citizen of the U. S.?", and in the 3rd count, that he made a false statement of citizenship before a board of special inquiry of the Immigration and Naturalization Service of the United States, when, as a witness, he testified that he acquired U. S. Citi-

zenship through his father's naturalization. The evidence established as to the first two counts, that he filed applications for a liquor license with the State Control Board having jurisdiction over the issuance of such licenses claiming therein that he was a citizen of the United States, and at the time of filing no one but a citizen was eligible for such a liquor license; and the supporting evidence as to the third count disclosed that the false claim of citizenship was made while he was testifying before the Immigration and Naturalization Service in aid of another alien's application for admission to this country to become an employee in defendant's business.

Of the appellant's contention that the proof did not "sufficiently show that his claims of U. S. Citizenship were material to the transactions at hand", this Court said:

"In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority * * * Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made * * * to 'stop the prying of some busy body.'"

In the above case the question of citizenship was both material to the transactions at hand and the law gave the authority and imposed the affirmative duty upon the officer's inquiring to ascertain the citizenship status of De Pratu; and the law itself by making it a condition precedent in each of the above instances, imposed a concomitant obligation on his part to truthfully answer. Here exists not only the legal right to inquire but the duty to do so, as well as the legal obligation to answer truthfully. "A right to inquire" does not mean just a casual right to inquire; it is a right to ascertain certain facts because of its relationship to the result. The legal right

to inquire includes the right to compel an answer as well as that the answer be truthful. In the *Du Pratu* case they had the right because the result, namely the issuance of the license, or the acquisition of an alien employee depended upon the citizenship of De Pratu.

In the instant case appellant's citizenship was not "material to the transaction at hand"; he would have been arrested or held as a material witness regardless of his alienage. The law treats alien and citizen alike in the circumstances of the instant case; it makes no distinction on that ground. The deception in the *De Pratu* case affected the end result, but in the instant case it did not and could not.

In the case of *U. S. v. Achtner* (C. C. A. 2d), 144 F. 2d 49, 52, the court said:

"Defendant had for a long time been in the employ of the Ebasco Services, Inc., a private corporation, and * * * in answer to a questionnaire of the corporation he stated that he was a citizen of the U. S. It would appear that this was a legitimate inquiry on the part of an employer at the time of the deepening national crisis * * *" (p. 52).

The court further said that,

"the representation of citizenship must still be made to a person having some right to inquire or adequate reason to ascertain a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken * * * to stop the prying of some busy body, and the use of the words 'knowingly' and 'falsely' implies otherwise. Thus it is said that the word 'falsely,' particularly in criminal statute suggests something more than a mere untruth and includes 'perfidiously' or 'treacherously,' (cases cited) or 'with intent to defraud' * * *."

A "legitimate inquiry" as used by the appellate court above implies materiality to the transaction at hand, namely: the employment or continued employment of Achtner would or could be affected by his citizenship status. Obviously the Company had a right to initiate its own security policies and exclude aliens as employees; the Company here obviously had the right to inquire as well as an adequate reason for ascertaining the defendant's citizenship since it was related to their employment practices. The result—employment, depended upon citizenship; in the instant case, arrest or detention did not depend upon citizenship. Further the circumstances of the *Achtner* case showed the false claim of citizenship was more than a mere untruth because it could or would affect employment and therefor satisfied the essential element of the charge that it was made "with intent to defraud."

In the case of *U. S. v. Tenderic* (C. C. A. 7), 152 F. 2d 3, 5, the defendant was charged with falsely representing himself to be a citizen to the Bendix Corporation; the evidence established that he did so and also that "it was the policy of the Bendix not to employ aliens." The sufficiency of the evidence was challenged and the 7th Circuit said in referring to *U. S. v. Achtner, supra*, said,

"'under this statute no limitation was placed upon the circumstances under which and the persons to whom the false representation was made, as long as it was for a fraudulent purpose.' We approve the conclusion and reasoning of the case."

See, also:

U. S. v. Weber, 71 Fed. Supp. 88.

II.

The Verdict Was Inconsistent With, Contrary and Repugnant to the Court's Instructions.

At pages 10, 11, *supra*, is set forth the Court's instructions on the cardinal aspects of the case. The law as given to the jury on the controlling and basic aspects of the case, was that the "false representation" as to citizenship must be made for "the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it" [R. 271], that it had to be "with intent to defraud" [R. 274], and "made for 'a fraudulent purpose,' " and " 'made with intent to deceive' such persons to whom made as to a material matter"; that the person inquiring must have a "right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship" [R. 274], that "the person inquiring concerning the nationality status of the defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration [R. 275]; that " 'to represent one's self' as a citizen, * * * means to hold one's self forth as, and to affirmatively claim to be a citizen of the United States" [R. 274, 275], and that the false representation was not made "to stop the prying of some busy body" [R. 274].

A reading of these principles of law, as given above by the trial court to the jury, under the facts of this case makes glaringly patent the inconsistency and repugnancy of the verdict of conviction.

We submit this point without further comment and upon the argument presented in the preceding point.

III.

The Court Erred in Permitting Testimony Concerning the Comity Arrangements of Public Authorities in Exchanging Information Concerning Arrestees.

The full evidence on this phase of the case is set forth at pages 15-18, *supra*. One only need read the excerpts of the Court's instructions in the previous point to demonstrate the utter immateriality of this testimony. Permitting this testimony to remain in the case furnished the foundation for the introduction of the false and highly prejudicial issue by the District Attorney that the appellant gained some advantage with the Immigration and Naturalization service of the United States.

Here are a few excerpts from the District Attorneys' argument to the jury on this testimony:

"So this information is relayed on there, and then, if the subject arrested is an alien, it might be—I don't say in this case that it was, that Mr. Smiley had an application for citizenship, for we have *no* evidence that he ever applied, and I will not contend that he did—but it *might* be that he would have a petition pending for naturalization. How serious it is to a man who is going down there taking these examinations as to citizenship and bringing in witnesses to prove good moral character, how serious would it be for the immigration officer on that case to get a call from the Beverly Hills Police Department saying, 'We have a man here who says he is a citizen of such and such a country; he is arrested.'

“Of course it wouldn’t mean that he would be denied citizenship, necessarily, but it would *alert* the Immigration and Naturalization Service to look into that fellow a little bit.

“When people are before the Immigration Service on any of the other matters, that Service has the duty of determining the right of the alien to remain in the United States. It is the office which arranges deportation matters.

“*Suppose* that that office were considering the subject of Mr. Smiley, or Mr. Smehoff’s deportation, that he was a subject of inquiry here. He might be getting along famously, from his standpoint, in warding off whatever attacks are made. How embarrassing it would be if, when he went down there one day, the Immigration Inspector would say, ‘Well, Smiley, the Deputy Sheriff has called up, the Los Angeles City Police Officer called up,’ or, ‘the Police Department of Beverly Hills has called up and said you are in trouble there, you have been arrested,’ and and that is what Lieutenant Cunningham said they would do if a man answered he was an alien. But this man got the *advantage of not* having that done.
* * * ” [R. 224, 226].

The foregoing was in his opening argument to the jury. After referring in detail to the above testimony the District Attorney argued:

“it would have been of the greatest interest to that Department, *not in order to determine whether Smiley was an alien*, because *they already knew that* and they had him on the fire before * * * he was

under a deportation proceeding, *perhaps* he was trying to set up his good moral character and his obedience of law, etc., in order to escape deportation * * * they would be interested in knowing that he was in trouble with the police. Officer Cunningham didn't tell them and the fact that he didn't tell them meant they didn't find out and when they didn't find out Smiley here got the advantage of not having to go down to the Immigration office for further investigation on that. He got the advantage of *not* having immigration inspectors out inquiring what was back of this charge and this trouble he was having with the police department" [R. 238, 239].

This argument, to our knowledge, is the outstanding classical example of building presumption upon presumption, speculative presumption upon speculative presumption. As we already know there is nothing in this record to show the nature and character of the deportation proceedings from which we could determine whether or not good character was at all relevant or material to any issue, and at that material in a speculative possible collateral proceeding. This false issue introduced by this testimony, if we may be guilty of indulging in a single presumption, was accountable for the verdict of conviction; because if the case had been determined by the jury on the issues as submitted to it under the law of the case by the Court, there was no alternative but to find a verdict of "not guilty." We will submit this point upon the foregoing comment and our discussion of Point I.

IV.

**The Court Should Have Given to the Jury Appellant's
Requested Instructions Nos. 27 and 30.**

These instructions are set forth *totidem verbis*, pages 14, 15, *supra*. The contention here is that the Court should have affirmatively charged the jury upon the principles of law contained therein, namely that the questions asked concerning appellant's citizenship were immaterial to the transaction, "the transaction at hand," namely his arrest on a charge of violating local gambling laws; and that no legal obligation rested upon the appellant to answer or to answer truthfully questions concerning birth or citizenship put to him at the time of his arrest for alleged violation of gambling laws.

U. S. v. De Pratu (C. C. A. 9), 171 F. 2d 75;

U. S. v. Achtner (C. C. A. 2), 114 F. 2d 49.

In the case of *Hersh v. U. S.*, 67 F. 2d 799, 807, this Court said:

"It is well settled in the federal court that where a correct proposition of law essential to the proper determination of the issues submitted to the jury is proposed by the defendants and the same is not given either in substance or effect, * * * the refusal to give such instruction is error. *Hendrey v. U. S.* (C. C. A.), 233 F. 5, 18; *Colderson v. U. S.* (C. C. A.), 279 F. 556."

Also, see:

U. S. v. Gold (C. C. A.), 102 F. 2d 350, 352.

The jury were entitled to know whether under the circumstances of the case the appellant was under legal obligation to answer such questions truthfully. They were also entitled to know that citizenship was immaterial to "the transaction at hand."

V.

There Was Error in Overruling Appellant's Motion to Dismiss the Indictments.

The motion to dismiss challenges the sufficiency of the indictment on the grounds that it could not be ascertained therefrom,

(a) that there was any fraudulent purpose of the defendant in making the alleged answers as to citizenship,

(b) how or in what manner the alleged representation of citizenship was fraudulent,

(c) whether any of the said persons mentioned as the persons to whom the alleged representation was made, was (1) one to whom the appellant was obligated to truthfully state the fact of citizenship, or, (2) was a person who had a legal right to inquire into, or an adequate legal reason for ascertaining the citizenship of the defendant [R. 5, 10, 12, 48, 51].

We are, of course, not unmindful of the language of this Court in the case of *U. S. v. De Pratu*, 171 F. 2d 75, that there was "no error in the trial court's refusal to dismiss * * * for failure to allege fraudulent purpose." Actually each count in the *De Pratu* case sets forth facts showing the existence of a fraudulent purpose; this Court said, nevertheless, that the statute does not "condition the outlawed offense upon the alleged existence of a fraudulent purpose in the mind of the one making false claim of citizenship." The dictum of the Court in this case would indicate that its holding here would be against our first ground of the motion to dismiss. However, we present it again for reconsideration of the Court as we desire to

preserve this point in the light of the opinions of two other courts of appeals and a district court.

U. S. v. Achtner (C. C. A. 2), 144 F. 2d 49;

U. S. v. Tenderic (C. C. A. 7), 152 F. 2d 3.

It is our view that under these latter cases an offense is not adequately charged unless facts are pleaded which show the existence of a fraudulent purpose, this being an element of the offense interpreted into the statute.

U. S. v. Cruickshank, et al., 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

The further challenge to the indictments that in each instance it does not appear therefrom the persons inquiring as to the appellant's nationality status were, (1) persons to whom he was obligated to truthfully state the fact of citizenship or, (2) persons who had a legal right to inquire into, or an adequate legal reason for ascertaining his citizenship. These contentions have not been answered by this Court or any other, to our knowledge. The rules and principles of pleading laid down in *U. S. v. Cruickshank* and *U. S. v. Carll, supra*, we maintain are applicable and that the indictment is deficient.

One may under certain circumstances answer untruthfully as to his nationality status; this being the case the pleading of the offense in the language of the statute is insufficient. The rule as stated by Justice Sanborn, in *Fontana v. U. S.* (C. C. A. 8), 262 Fed. 283, 288, is pat in principle to the instant case:

"It is an elementary rule of criminal law that when language does *not* constitute a crime if uttered under some circumstances, and *does* constitute a crime if ut-

tered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so the court can determine, and not the pleader, whether or not they constitute the crime, U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516.”

The descriptive language in the indictment that the person inquiring was one ‘having good reason to inquire into the nationality status of the defendant,’ is meaningless, because any interloper may have personal “good reason” or a business “good reason,” such as a neighbor or the employee of a national survey. It must be more than a personal “good reason;” the right to inquire must be bottomed on a legal right to inquire. It means as charged by the trial court “an adequate reason or right in law in furtherance of * * * official authority and duty.”

Conclusion.

It is accordingly submitted that error of a prejudicial character has been established in connection with each of the specifications relied upon; further, the Court was without jurisdiction to try and sentence this appellant.

It is submitted that the judgment should be reversed.

Respectfully submitted,

OTTO CHRISTENSEN,
ROBERT NEEB,

Attorneys for Appellant.

No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

FEB 23 1930

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No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

This is an appeal from two judgments rendered against Appellant in the United States District Court for the Southern District of California, Central Division, upon two verdicts finding Appellant guilty in consolidated cases of three violations of U. S. C. Title 8, Sec. 746(a)(18)—falsely claiming to be a citizen of the United States.

The earlier of the two indictments (No. 20069) in Count One charged a violation of said statute on or about June 21, 1947. In Count Three a violation was charged as of May 25, 1944. Count Two of that indictment was dismissed and the offense therein alleged was charged in a new indictment (No. 20604) alleging a violation of said statute on or about November 1, 1945 [Indictments R. 2, 11; Verdict R. 34; Judgments R 38, 40]. Appellant was sentenced to the custody of the Attorney General for imprisonment and was fined upon each Count.

The District Court had jurisdiction under 28 U. S. C., Sec. 41(2).

This Court has jurisdiction of the appeal under 28 U. S. C., Sec. 225(a).

Statement of the Case.

Count One of the indictment No. 20069 charged Appellant with having violated sub-paragraph (18) of Section 746(a) of Title 8, U. S. C.

The language of the body of the indictment is as follows:

On or about June 21, 1947, in the County of Los Angeles, State of California, and within the Central Division of the Southern District of California, defendant Aaron Smehoff, alias Allen Smiley, did knowingly, wilfully, falsely and fraudulently represent to Thomas A. Cox, an employee of the Police Department of the City of Beverly Hills, California, said Thomas A. Cox being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States, whereas in truth and in fact, as the defendant then and there well knew, the defendant had not been naturalized, had not been admitted to citizenship, and was not otherwise a citizen of the United States.

Count Three of said indictment charged an offense in the same language with the exception that the date thereof was charged as May 25, 1944 and the person to whom the Appellant represented himself was J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California [R. 3].

Before the trial Count Two of said indictment was dismissed and Indictment No. 20604 was filed in its stead.

In language it was the same as the above quoted first Count except that the date of the offense charged was November 1, 1945, and the false representation was charged to have been made to the Los Angeles Police Department, a department and agency of the City of Los Angeles, State of California [R. 11].

Appellant's Motions to dismiss the indictments were denied [R. 4, 10, 12, 48, 51]. It was stipulated that the two indictments be tried together [R. 52]. They were so tried [R. 47-250]. Appellant was convicted upon all counts [R. 247-249].

Questions in the Appeal.

Appellant's brief on appeal states several bases of attack on the judgments. They all resolve into certain basic challenges as follows:

- A. That the Indictments are deficient;
- B. That the evidence was insufficient to establish the offenses;
- C. That the Court erred in the admission of certain evidence.
- D. That the Court erred in refusing to give Appellant's requested Instructions 27 and 30.

Appellee will treat of these propositions under the following titles:

- I. The Indictments Are Adequate.
- II. The Crimes Charged Were Proved.
- III. The Court Properly Admitted the Evidence of Which Appellant Complains;
- IV. Appellant Was Not Entitled to His Proposed Instructions 27 and 30.

The Facts.

Certain facts are of common application to all counts of the indictment of which Appellant has been convicted. They establish that Appellant was not a citizen of the United States at the times charged in the several counts; and that he knew that he was not a citizen of the United States at the times he made statements that he was such a citizen. Said facts, fundamental to each count, were established at the trial as follows:

Appellant's landlady, Lillian May Hoover, identified Appellant [R. 72] as a tenant of an apartment in her apartment house in Los Angeles. He occupied it under a lease [Ex. 8, R. 73], and has resided there since June 6, 1944 [R. 75]. Ray E. Griffin, Chief of the Nationality and Status Section, Immigration and Naturalization Service [R. 76-77], testified that all of Southern California, including Appellant's apartment is within the district served by his office. That office has a record of persons who have achieved citizenship in Southern California, by naturalization. Those records do not show Aaron Smehoff (the name under which Appellant was indicted) or Allen Smiley (the name used by Appellant) as having been naturalized [R. 78-79]. Exhibit 3 is a "Certificate of Non-Existence of Naturalization Record" (admitted in evidence) [R. 79]. It shows that there is no record in the central office of the Immigration and Naturalization Service of naturalization of any person named Aaron Smehoff or Allen Smiley.

Another official of the same Service, Perley B. Dunn, testified that he took the fingerprints of Appellant as they appear on Exhibits 1 and 2 [R. 146-147]. It was stipulated Appellant signed Exhibit 1 [R. 147] and that he

also signed the document of which Exhibit 2 is a photostat [R. 147]. It was further stipulated that as to the portions of the exhibit not covered by the Clerk, the questions appearing thereon were asked of Appellant by Mr. Dunn, an official of the Immigration and Naturalization Service and that the answers recorded were given Mr. Dunn by Appellant who was under oath [R. 149]. Exhibit 2 shows in substance that Appellant, in his declaration under oath, states that he is a foreign born alien, and on October 1, 1945 registered as such under the wartime statutes which required such registry by aliens in the United States.¹ Appellant was under oath at the time. The Exhibit bears various date stamps. It was stipulated Appellant signed it October 1, 1945 [R. 152]. Appellant was at that time in the office of the Immigration Service in connection with a deportation proceeding instituted by the United States Government [R. 153-155]. Appellant's attorney was present. On October 1, 1945, Appellant testified before a hearing officer of the Immigration Service that he had been born in Russia and taken to Canada as a child; that

¹⁸ U. S. C. 452:

“Registration of aliens in United States

“(a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

“(b) It shall be the duty of every parent or legal guardian of any alien now or hereafter in the United States, who (1) is less than fourteen years of age, (2) has not been registered under section 451 of this title, and (3) remains in the United States for thirty days or longer, to apply for the registration of such alien before the expiration of such thirty days. Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.”

he believed he was a naturalized citizen of Canada because of the naturalization of his father to Canadian citizenship before Appellant reached the age of 15 years [R. 156].

Following the reception of said evidence, Appellant's counsel stipulated that Appellant had been born abroad in what was then a part of Russia, and as a baby disembarked with his parents in the Dominion of Canada and has been an alien resident of the United States during all times mentioned in the Indictment.

Detail of Evidence by Counts.

COUNT ONE.

During 1947, Thomas A. Cox was employed by the Beverly Hills Police Department as a Desk Clerk. He was one of the men who kept identification records together and also worked at booking persons in custody [R. 114]. The procedure employed at the police station required that a person arrested and brought in for booking be brought to the booking counter where the desk clerk would take a regular prescribed form [Ex. 7] and ask the person arrested the questions indicated on that form and would fill in on the form the answers given by the person arrested [R. 115].

On June 21, 1947, Mr. Cox was on duty as desk clerk at the booking office. Appellant was then in custody of the Beverly Hills Police Department. There had been a murder, and he was a person that was near, and was questioned along with other people. Although under arrest at the time, and the hereinafter specified questions were put to him, he was never charged with the crime then under investigation. When brought to Mr. Cox at

the booking desk, Cox asked him questions detailed at R. 117-118 to which Appellant answered, making the following representations:

That his name was Allen Smiley. He resided at 1220 Sunset Plaza Dr., Los Angeles, California. His telephone number was CR 19145; his eyes blue and his hair grey. His height five feet eleven inches and his weight 170. Age 39. Complexion Ruddy. Build Medium. He said his descent was Jewish, and his Nationality American; that he was born in New York January 10, 1908, had been in Los Angeles County twenty years; California the same length of time; and that he had been in the United States all of his life [R. 117-118].

COUNT THREE.

During the seven years preceding the trial, Jacob E. Siu was a deputy sheriff of Los Angeles County [R. 80]. On May 25, 1944, he arrested Appellant, took him to the sheriff's office, and booked him [R. 81]. By "booking" the witness meant getting information down on paper before jailing the prisoner [R. 82].

In connection with booking Appellant, Deputy Sheriff Siu prepared Exhibit 4. He obtained the information, which appears on that Exhibit, by asking Appellant questions and writing down the answers given. The purpose in taking the information is to preserve an identification record. In preparing Exhibit 4 [admitted R. 91], the deputy sheriff asked Appellant questions in reply to which

Appellant said that he had lived in Los Angeles County eighteen years, and in the United States all of his life. He gave his age as 37 years [R. 80-83].

As part of the same booking procedure Deputy Sheriff Siu took Appellant to the Senior Clerk in the department which booked prisoners. The booking routine was continued in Mr. Siu's presence by the Clerk, Witness Milton S. Hopkins typing certain information on Exhibit 5 [received in evidence R. 136]. Among other things, he asked Appellant whether he was a citizen of the United States. Appellant replied, "Yes" [R. 123], and gave his birth place as "New York" [R. 122]. The witness typed the answers on Exhibit 5.

In the course of a long cross-examination [R. 125-136], Witness Milton S. Hopkins was asked if he had an independent recollection that Appellant gave the particular answers recorded on Exhibit 5. The witness replied: "I do remember that I asked those questions and I put down the answers that was given me" [R. 128]. When his memory was challenged because of the lapse of time between event and testimony, he stated he remembered because Bugsey Siegel was being booked at the same time and the case had attracted photographers so that it became an event he remembered independently [R. 126-128]. Exhibit 5 is a record kept and required to be kept by the Sheriff's office in the regular course of business and is acted upon in business concerning the prisoner [R. 133-136].

THE NEW INDICTMENT SUBSTITUTED FOR COUNT TWO.

On November 1, 1945, Orville E. Harper was a Los Angeles City Police Officer [R. 99]. He was a booking officer at the Lincoln Heights Jail in Los Angeles [R. 100]. On said date at about 3:00 A. M., the witness Harper booked Appellant at that jail. At that time said Harper placed the information relative to Appellant on Exhibit 9 [received in evidence at R. 113]. He received the information from Appellant at the time he was booked [R. 101]. It is the practice to ask prisoners to sign the document after it is prepared [R. 102].

Some of the information on Exhibit 9 was copied from a booking slip and part of it was typed on Exhibit 9 directly following the giving of an answer to the question by Appellant [R. 107]. The answer "Yes" after the query, "citizen" was placed on Exhibit 9 by the witness following his having asked the question of Appellant, and Appellant having answered "Yes" [R. 107]. Appellant also replied orally to the witness's queries, that he was 38 years of age, had been in Los Angeles County for 20 years and had been in the U. S. A. for 38 years [R. 107-108]. The only information on Exhibit 9, which was copied rather than written in reliance upon direct answers of Appellant, is the address of Appellant and the location of the arrest [R. 108-109].

Exhibit 9 was prepared by the witness pursuant to a departmental order.

It was then stipulated that Don Myer, a qualified handwriting expert, should be deemed to have testified that a comparison of the signature of Appellant upon Exhibits 1 and 2 (which had been signed by Appellant in the presence of Witness Hamilton) with the signature upon Exhibit 9 disclosed that the name "Allen Smiley" on Exhibit 9 had been written by the same person who had signed that name on Exhibit 9 [Exhibits 1, 2 and 9 were admitted at R. 113-152]. The only objection to the receipt of Exhibit 9 in evidence was that it was irrelevant and immaterial.

Frank H. Cunningham testified that he is the Assistant Commander of the Record and Identification Division of the Los Angeles Police Department [R. 96]. Records are kept under his directions. Exhibit 9 is known as an identification report. It is the Los Angeles Police Department's Form 5.5 and is required to be kept in the usual and ordinary course of the business of the Police Department. It is acted upon by the police department in its work and is available to all *bona fide* law enforcement agencies, including the Immigration and Naturalization Service of the United States.

The Form 5.5, Exhibit 9, is used by the Police Department as an adjunct to the finger print card. It furnishes additional information for future identity of the subject. The information is indexed in various forms [R. 97].

If it comes to the attention of Mr. Cunningham's department that an arrested man is an alien, the Immigration

Department is notified. Specifically, Mr. Pendergast, Mr. Cole, or Mr. Nelson are contacted [R. 143-144]. Fingerprints, arrests, and the nature of the offense are automatically sent to the Federal Bureau of Investigation [R. 144-145]. In booking routine, the police are interested in a lot of statistical information for purely police purposes [R. 145]. The practice of referral to the Immigration Service was enforced during 1944, 1945, 1946 and 1947 [R. 146].

EVIDENCE APPLICABLE TO ALL COUNTS.

Richard B. Hood testified that he is the Special Agent in Charge of the Federal Bureau of Investigation at Los Angeles [R. 137]. He is familiar with the use made by that Bureau of identification material and information taken from prisoners in police stations, sheriffs' offices and the like. Identification orders are prepared from identification cards submitted to the Bureau. Nationality and citizenship information is a pertinent part of the identification record, the same as age, height and weight. Information as to nationality and citizenship is of tremendous value to an investigating officer. Identification material concerning persons suspected of crime, arrestees and persons prosecuted is kept by the Bureau in its Identification Division in Washington, D. C. Such files are available to the Immigration and Naturalization Service and the Service is notified when an alien receives a sentence in court [R. 137-143].

ARGUMENT.

I.

The Indictments Are Adequate.

The form of the indictment is the classical one which has been used for many years. It has been expressly approved by this Court in *De Pratu v. United States*, 171 F. 2d 75 (C. C. A. 9, December 13, 1948). In its essential charging language, the indictment in that case is like that in the cases now before this Court. In upholding the sufficiency of the indictment, the Court, in the *De Pratu* case, said:

“The attack upon the sufficiency of the indictment is based upon asserted necessity for allegation and proof of fraudulent purpose in the making of the false claim of citizenship. The present statute does not expressly so provide, and from a reading of it it readily appears, contrary to appellant’s contention, that Section 746(a) (18), Title 8, U. S. Code (now 18 U. S. C. A., §911), under which this indictment was laid, *does not by implication or otherwise condition the outlawed offense upon the alleged existence of fraudulent purpose in the mind of the one making false claim of citizenship, although that fraudulent purpose was a necessary ingredient of the similar offense under the previous law which was supersedes by said Section 746 (a) (18).* We find no error in the trial court’s refusal to dismiss any count of the indictment for failure to allege fraudulent purpose or for any other reason.” (Emphasis supplied.)

In its Decision, this Court of Appeals cited and followed the Court of Appeals for the Second Circuit in its Decision in *United States v. Achtner*, 144 F. 2d 49. The indictment is described and discussed in the opinion in the *Achtner* case as follows:

“The indictment here charged that on or about October 8, 1941, defendant, Wolfgang T. Achtner, being an alien never naturalized as a citizen, ‘unlawfully, wilfully and knowingly did falsely represent himself to E. D. Kenney of the Ebasco Services, Inc., 2 Rector Street, New York City,’ to be a naturalized citizen of the United States, in violation of 8 U. S. C. A., §746(a) (18), which was expressly cited. Defendant pleaded ‘not guilty’ to this charge at his arraignment on January 11, 1944; but on January 21, 1944, the day on which his present counsel was assigned, he changed that plea to ‘guilty.’ Thereafter, on February 2, 1944, he moved for an order permitting him to change his plea to ‘not guilty’ and to quash the indictment as insufficient on its face. The court denied the motion, however, in a considered opinion and sentenced defendant to imprisonment for three years. This appeal attacks the judgment of conviction and the denial of the motion to quash the indictment and change the plea of ‘guilty’ on the ground that no offense against the United States had been charged.

“The statute, 8 U. S. C. A., §746(a), sets out in thirty-four numbered subdivisions at least that number of separate offenses related in some way to naturalization proceedings, citizenship status, and the control of aliens in this country. It represents for the most part a codification in one place in the National-

ity Act of 1940 of offenses formerly scattered in various places. Subdivision (18), with which we are immediately concerned, makes it a felony for any alien 'knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.' This subdivision is a substantial reenactment of the repealed 18 U. S. C. A., §141, originally passed in 1870, which, under the heading, 'Falsely claiming citizenship,' made liable to fine and imprisonment any person who 'for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship.' Thus, the only pertinent difference between the definitions of the two sections is that the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.' Significant also is the increase in the penalty by the later legislation from a maximum of \$1,000 fine and two years' imprisonment to a \$5,000 fine and five years' imprisonment.

“(1-3) The first and most important question with which we are presented concerns the sufficiency of the indictment, which, as we have seen, does little more than reiterate the language of the statute. We are no longer bound by ancient and antiquated rules of common-law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations.
* * *”

II.

The Crimes Charged Were Proved.

The evidence must be tested by the statute which defines the offense, rather than by counsel's unenacted and legally non-existent restrictions. The statute is concise and clear. The salient provisions of Section 746, Title 8, are as follows:

“(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

“* * *

“(18) *Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.*” (Emphasis supplied.)

Where the language of a statute is unambiguous, recourse to outside sources in its interpretation is not permissible. The language of the statute in this case is plain and there is no occasion for construction. It construes itself.

Russell Motor Car Co. v. United States, 261 U. S. 514.

The intention of Congress in enacting a statute is to be sought for primarily in the language used, and, if the language is clear and unambiguous, it must be accepted without modification, and without resort to construction or conjecture.

In re Borchort, 47 Fed. Supp. 387;

Fleet v. United States, 228 Fed. 421.

There is no conflict in the evidence. The contention that it is insufficient boils down to a theory that the persons to whom the false representations were made in the first indictment, and the Police Department in the second, were not persons "having good reason to inquire into the nationality status of the defendant." In view of the emphasis placed on this argument, it is an odd circumstance that the overruled objections to materiality and relevancy of evidence were all directed at testimony which enhanced the picture of law enforcement officers having a serious use for the information Appellant was asked to provide them relative to his citizenship status.

Appellant attempts to squeeze more out of the *Achtner* case than was ever poured into it by the learned Judges of the Second Circuit. At page 26 of his brief, he attempts to place "fraudulent purpose" back into the statute by judicial construction.

The "law" of the *Achtner* case does not modify the existing statute. It only comments that words spoken as a mere boast or jest or to stop the prying of some busybody are not criminal under a statute which obviously covers serious as distinguished from frivolous transactions.

The prohibition of the statute is absolute. The language adopted by Congress does not hedge the restriction upon the conduct of aliens to a few limited situations. Instead, Congress repealed the old law which did denounce false representations for a "fraudulent purpose." As was said in the opinion in the *Achtner* case (144 F. 2d 49, at p. 50), "* * * the present statute has substituted the words 'knowingly to falsely represent' in the place of the prior representation 'for any fraudulent purpose whatever.'" Retention of the word "represent" requires that to ground

the offense, there be an element of seriousness to a statement that one is a citizen of the United States. But it does not reinstate the repealed "fraudulent purpose" as an element when the re-enactment clearly took "fraudulent purpose" out and left as the only qualifying phrase "knowingly to falsely represent." Although "falsely" is an ingredient of "fraudulently," the *repeal* of "fraudulently" leaves "falsely" to stand by itself, stripped of the additional ingredients which go to create fraud. The old and present statutes are compared and discussed in *United States v. Achtner*, 144 F. 2d 49.

In its comment, the Court said:

"* * * And the intent of Congress in October, 1940, when §141 of Title 18 was replaced by §746 of Title 8, was quite obviously to extend, rather than to reduce, the coverage, as well as the penalties, of the prior law, for the latter statute was part of the Nationality Act of 1940, a national defense measure enacted in the face of the impending war to help tighten controls over the conduct of aliens in this country. * * * Subsections (b) and (c) must, therefore, clearly be read as intended additions and amplifications of the provisions of subsection (a), rather than as narrowing and well-nigh stultifying limitations of it."

The Indictment charges that the persons to whom Appellant falsely represented himself as a citizen of the United States had "good reason to inquire."

This is a pleader's way of saying that the false representation did not consist of words spoken as a mere boast or jest or to stop the prying of some busybody.

The proof supports the pleading.

The Agent in charge of the Los Angeles Office of the Federal Bureau of Investigation testified [R. 137-143] that the Bureau maintains identification records in Washington, D. C.; that this is a central place where identification data concerning persons suspected of crime, arrestees, and persons prosecuted is kept; that information from those files is provided law enforcement agencies and in turn *the Bureau accumulates identification material from police stations, sheriffs' offices and the like.*

The Assistant Commander of the Record and Identification Division of the Los Angeles Police Department testified [R. 96-98 and 143-146] that his Department supplied identification information relative to arrestees to the Federal Bureau of Identification and that if an arrested man stated he was not a citizen of the United States, the Immigration Service was notified of the arrest.

Appellant contends that the inquiry made of him was not material to the transaction at hand, and hence the answers given did not amount to false representation.

This contention disregards the fact that the matter at hand was not an inquiry into whether Appellant had committed an offense, but was the *acquisition of identifying characteristics* by police officers who worked in the climate of acquiring that information:

A. So that they would have identification characteristics of a prisoner who was being booked and might make bail *and might become a fugitive, and for whom they might have to search and alert others to search.*

The local agent in charge of the Federal Bureau of Identification testified that, knowledge of a fugitive's citizenship would be "of tremendous value to an investigating officer." [R. 138.]

B. So that they would be able to convey the identification information to the Central office of the Federal Bureau of Identification.

C. So that they could notify the Immigration and Naturalization Service if the arrestee were an alien.

D. So that officers of the Immigration and Naturalization Service would be alerted to inquire further if the alien-arrestee were either a person under or subject to deportation proceedings; or an applicant for naturalization under a necessity of being of good moral character.

III.

The Court Properly Admitted the Evidence of Which Appellant Complains.

Appellant argues that the several officers who questioned him as to whether he was a citizen were "busybodys." When the law exempts from criminality mere boasts, jests, or words uttered to stop the prying of some busybody, it certainly admits evidence to disclose that real use is made of the information elicited and that the inquiry is in the course of regular business.

IV.

**Appellant Was Not Entitled to His Proposed
Instructions 27 and 30.**

The Proposed Instruction 27 reads as follows:

“INSTRUCTION No. 27.

“Testimony has been received that the defendant on one occasion was interviewed by city police officers of Beverly Hills, California, during the course of an investigation into the commission of an offense against the State of California. Also testimony has been received concerning routine interrogation of the defendant by municipal and county police officers at the time of his arrest and routine booking for violation of local gambling laws. Statements made by the defendant on those occasions were not made in the course of any judicial proceedings or under oath. The questions asked concerning his citizenship were all immaterial to the particular investigation and charges, and the defendant was not under any legal requirements to answer such questions.” [R. 30.]

The interrogation of Appellant was not an inquiry into an alleged violation of gambling laws. Every person to whom Appellant falsely represented himself to be a citizen of the United States was accumulating identification data at a booking of Appellant.

The Proposed Instruction 30 is also warped to the mistaken theory that Appellant was asked his citizenship status as a part of an investigation for gambling:

“INSTRUCTION No. 30.

“Inquiry by a city or county police officer in connection with the arrest of an individual for an alleged

violation of gambling laws as to the place of such individual's birth or citizenship does not impose upon such individual any legal obligation to answer such question truthfully." [R. 31.]

Most offenses having to do with untruths punish for unsworn statements. Assuming, but not conceding, that Appellant could properly have refused to answer the queries put to him, it still remains that such a right could be waived. If it existed in this case it was waived by being answered, as the questions were answered wilfully, and falsely, and deprived those acting upon the answers of true information. The answers properly became criminal under the very authorities relied upon by Appellant.

Conclusion.

It is respectfully submitted that the judgments should be affirmed.

ERNEST A. TOLIN,
United States Attorney,
Attorney for Appellee.

No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

In replying to the Government's Brief, the issues presented by the Opening Brief of this Appellant will be discussed in the same order followed in the Opening Brief with a notation as to the place in the Opening Brief at which the issue is there discussed, together with a notation to the page in the Government's Brief at which the issue is discussed.

POINT I.

(Error I.)

The Evidence Was Insufficient to Establish the Offenses Charged as to Each Count of Indictment 20069 and Indictment No. 20604.

This Point is discussed as Point II of the Government's Brief, pages 15-19, it is discussed in our Opening Brief at pages 19-26.

Appellee first cites Sub-paragraph (18), Title 8, which Appellant is accused of violating, and then refers to certain civil cases, which we shall consider, on academic principles of statutory construction, *i. e.*, "The language of the statute in this case is plain and there is no occasion for construction," and "if the language is clear and unambiguous, it must be accepted without modification, and without resort to construction or conjecture." These announced principles of construction are asserted to be drawn from the following cases: *Russell Motor Car Co. v. United States*, 261 U. S. 514; *In re Borchort*, 47 Fed. Supp. 387; *Sweet v. United States*, 228 Fed. 421 (cited by appellee as *Fleet v. United States*.)

The case of *Russell Motor Car Co. v. United States*, *supra*, involved the question of the executive power to cancel certain contracts for the production of anti-aircraft gun mounts following World War I; the statute involved empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." The Motor Car Co. contended that the statute above quoted applied "to private contracts alone, and affords no authority for the cancellation by the Government of its own contracts." The Court said: "It must be apparent, we

think, that the words of the provision, 'any existing or future contract' read with literal exactness include all contracts, whether private or governmental."

In re Borchort, 47 Fed. Supp. 387, another civil case, the District Court reviewed an order in a bankruptcy proceeding under the Frazier-Lemke Act; the Court had before it for consideration, Subsection (1) of Section 75, which provides: "*Existing* mortgages, liens, pledges, or encumbrances shall remain in full force and effect." The Court said in applying this Section: "Here, however, Petitioner did not hold an 'existing' lien at the time of bankrupts' adjudication. . . . The holder solely of a continuing crop mortgage has no interest or lien upon the land. The lien of such mortgage attaches only when the crop comes into actual existence (citing cases). The intention of Congress is to be sought for primarily in the language used, and if the language is clear and unambiguous, it must be accepted without modification, without resort to construction or conjecture."

In *Sweet v. United States* (C. C. A. 8), *supra*, the Court said:

"By the terms of the Enabling Act of the State of Utah, the United States granted sections (certain) in every township in that state to the state for the support of common schools. The act contained no exception or reservation of mineral lands from this grant." Certain lands within these sections were conveyed by the State of Utah, and the United States Government sought to quiet title to them in itself, on the ground that "the conveyed land was well-known coal land when the State of Utah was admitted into the Union; and for that reason never passed to the State; the lower court sustained the claim of the Govern-

ment, and the Circuit Court of Appeals reversed the lower court; in reversing, the Appellate Court stated: "Congress had the power to make or to withhold this grant in whole or in part. * * * Nevertheless it did not except or reserve mineral lands from the grant. And where a legislative body makes a plain grant or provision, and makes no exception to it, the legal presumption is that it intended to make none, and it is not the province of the courts to do so."

These civil cases present no analogy whatsoever to ours and have no application. Appellee even concedes that the statute does not reach all instances of false statements as to nationality status (pp. 16-17). Appellee states that "the word 'represent' requires that to ground the offense, there be an 'element' of seriousness to a statement that one is a citizen of the United States", and that "the false representations did not consist of words spoken as a mere boast or jest or to stop the prying of some busybody."

Appellee refers fragmentarily to *United States v. Achtner*, 144 F. 2d 49, and asserts concerning this case, at page 16 of his brief, that: "It only comments that words spoken as a mere boast or jest or to stop the prying of some busy-body are not criminal," under the statute.

The *Achtner* case goes far beyond this in its holdings. It holds that under the statute (p. 62) "the representation of citizenship must still be made to a person having some right to inquire or adequate reason to ascertain a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken * * * to stop the prying of some busy body, and the use of the words

‘knowingly’ and ‘falsely’ implies otherwise. * * * the word ‘falsely’, particularly in criminal statute suggests something more than a mere untruth and includes ‘perfidiously’ or ‘treacherously,’ (cases cited) or ‘with intent to defraud’ * * *.”

Appellee really contents himself in reply to our discussion of this point with the statement (Appellees’ Brief p. 16): “The contention that it is insufficient (the evidence) boils down to a theory that the persons to whom the false representations were made in the first indictment, and the Police Department in the second, were not persons ‘having good reason to inquire into the nationality status of the defendant.’” Appellee is completely in error with this synopsis of our position. At page 19 of our Brief, we have categorically set forth our basic contentions separately under the alphabetical headings of (a) through (f). These several basic contentions are all based on and drawn from the facts and opinions in the case of *United States v. Achtner, supra*, and by this court in *United States v. De Pratu*, 171 F. 2d 75, 76.

Singularly, Appellee has completely ignored our discussion of the opinion of this court in *United States v. De Pratu*, and makes no mention of it whatsoever. This court in the *De Pratu* case, on the appellant’s contention that the proof did not “sufficiently show that his claims of U. S. Citizenship were material to the transactions at hand” said:

“In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official

duty * * * Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made * * * to 'stop the prying of some busy body.' "

Both in the *De Pratu* case, *supra*, and the *Achtner* case, citizenship was material to the transactions at hand. In the *Achtner* case, the company had a right to initiate its own security policies and exclude aliens as employees, and therefore had the right to inquire as well as an adequate reason for ascertaining the defendant's citizenship, since it was related to their employment practices. Employment depended upon citizenship. In the *De Pratu* case, the law gave the authority and imposed the affirmative duty upon the officers inquiring to ascertain citizenship status; the law there made citizenship a condition precedent to favorable action in each of the instances involved.

In all of the reported cases, citizenship was material to the transaction and subject matter under consideration because the end result would or could have been different, depending upon whether the individual was alien or citizen.

Justice Sanborn in *Sweet v. United States*, *supra*, said:

"It is a familiar rule of construction that every decision of a Court should be considered and given effect in the light of the facts which conditioned it."

Not only the *De Pratu* case, but the cases of *United States v. Tenderic*, 152 F. 2d 3 or *United States v. Weber*, 71 Fed. Supp. 88, were not distinguished or even discussed in Appellee's brief.

POINT II.

(Error II.)

The Verdict Was Inconsistent With, Contrary and Repugnant to the Court's Instructions.

Appellee makes no answer whatsoever to this point.

POINT III.

(Error III.)

The Court Erred in Permitting Testimony Concerning the Comity Arrangements of Public Authorities in Exchanging Information Concerning Arrestees.

This point is discussed as Point III of the Government's Brief, page 19; it is discussed in our Opening Brief at pages 28-30.

Appellee's sole Answer is that "when the law exempts from criminality mere boasts, jests, or words uttered to stop the prying of some busybody, it certainly admits evidence to disclose that real use is made of the information elicited and that the inquiry is in the course of regular business."

The law does not alone exempt from criminality mere boasts, jests or words uttered to stop the prying of some busybody; it also exempts from criminality cases not involving the "right in law in furtherance of official authority and duty" to inquire and false answers as to citizenship, not material to "the transaction at hand" and "mere untruths" not made "with intent to defraud," and those not "made with intent to deceive * * * as to a material matter," etc.

This case is entirely unlike the *Achtner*, *De Pratu*, *Tenderic* cases or any reported case; all of the cases in the books were conditioned upon facts showing the right legally to inquire as to citizenship and its materiality to the subject matter; further all of the cases showed the perpetration of fraud and that the end result would or could have been different if the true nationality status were disclosed.

A business survey may have a good reason to inquire concerning nationality status, or even a neighbor, but the law does not impose upon the individual interrogated the obligation to truthfully answer. This need only be done when an adequate reason and legal right to inquire exists, and, if it is material to the subject matter. Under Appellee's theory evidence would be proper to disclose that a survey agency made real use of the information elicited, *i. e.*, supplied it as a service to department stores, to periodicals, etc.

On the sole theory of showing appellant gained an advantage this testimony was offered and received. It of course showed none under the record in this case and needed the unfair argument of the prosecution based on pure speculation to give it implementation.

A fair trial required a trial free from this irrelevant evidence and speculative argument based thereon.

POINT IV.

(Error IV.)

The Court Should Have Given to the Jury Appellant's Instructions No. 27 and No. 30.

This point is discussed as Point IV of the Government Brief, pages 20-21; it is discussed in our Opening Brief at page 31.

Appellee's only answer on this point is that "the interrogation was not an inquiry into an alleged violation of gambling laws." The interrogation however arose out of and in connection with an arrest for a gambling violation. If it were not material to that transaction the jury should have been so told and the issue not left to speculation. Appellee not only fails to answer our position on this point, but fails to distinguish or even discuss the cases cited in support of our contention.

POINT V.

(Error V.)

There Was Error in Overruling Appellant's Motion to Dismiss the Indictments.

This point is discussed as Point I of the Government's Brief, pages 12-14; it is discussed in our Opening Brief as our last point at pages 32-34.

While we have de-emphasized this point by making it our Point V, the Government emphasizes it and makes it their Point I. As to our grounds (a) and (b), we stated in our Opening Brief that the case of *United States v. De Pratu, supra*, as to the sufficiency of the allegations of the indictment, indicated to us that this Court would hold

here against us on these grounds; but that we presented it again for reconsideration of the Court, as we desired to preserve this point in the light of the opinions of two other Courts of Appeals and a District Court:

United States v. Achtner (C. C. A. 2), 144 F. 2d 49;

United States v. Henderic (C. C. A. 7), 152 F. 2d 3;

United States v. Weber, 71 Fed. Supp. 88.

The contentions advanced on the second ground are answered by the Government by the statement that an indictment in the language of this statute is sufficient.

In neither the *De Pratu* case or the *Achtner* case was our second ground before the Court. In fact, to our knowledge, these contentions have not been answered by this or any other Court.

As we have seen, one may under certain circumstances answer untruthfully as to his citizenship without violating this statute. The Appellee in its Brief at pages 16-17, concedes that not all false representations that one is a citizen violates the statute. Therefore, we are governed by the principle as stated in *United States v. Fontana* (C. C. A. 8), 262 Fed. 283, 288:

“It is an elementary rule of criminal law that when language does *not* constitute a crime if uttered under some circumstances, and *does* constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so the court can determine, and not the pleader, whether or not they constitute the crime. *U. S. v. Hess*, 124 U. S. 483, 31 L. Ed. 516.”

Conclusion.

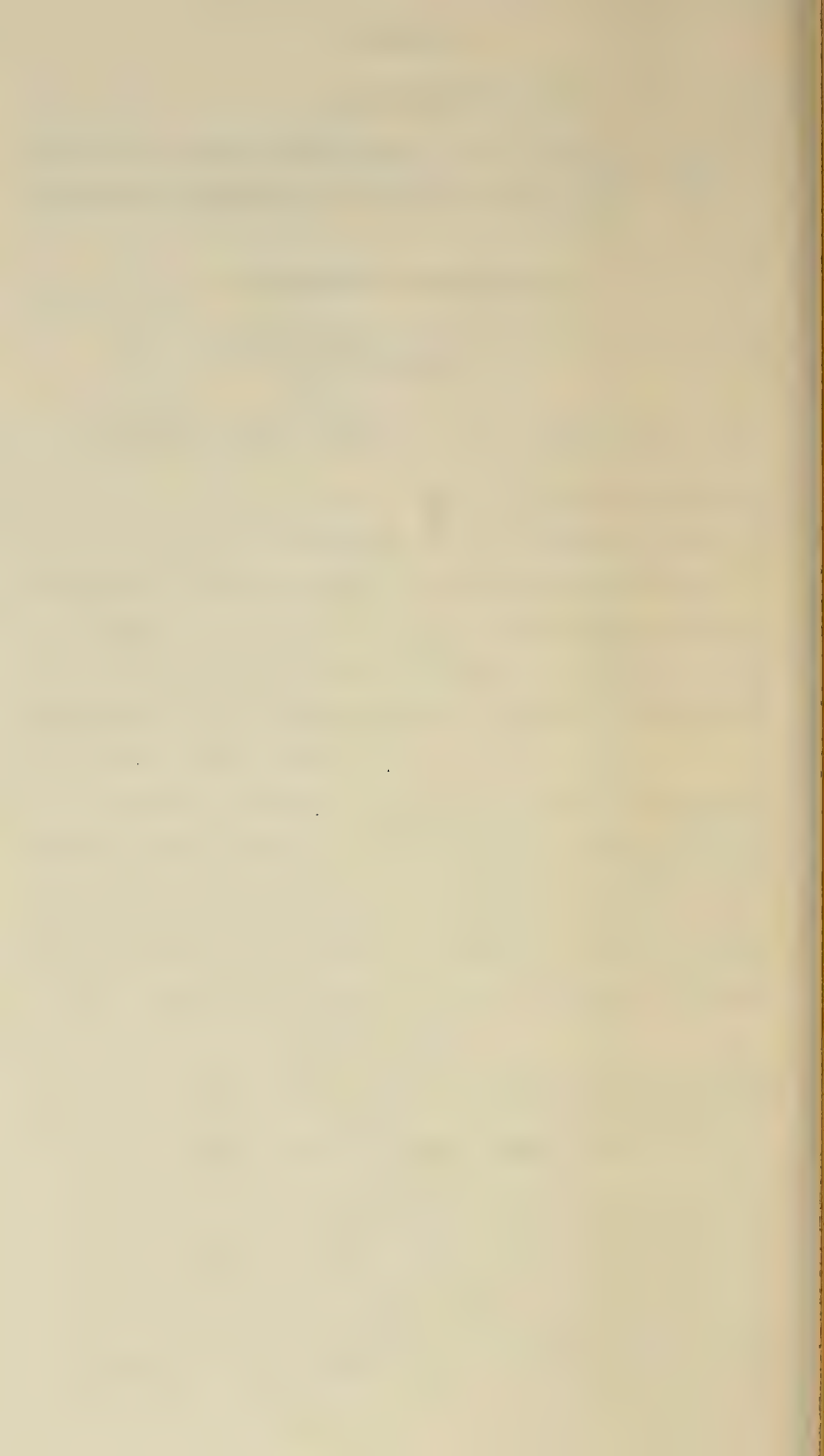
For each and all of the reasons set forth in our Opening Brief, it is submitted that the judgment should be reversed.

Respectfully submitted,

OTTO CHRISTENSEN,

ROBERT NEEB,

Attorneys for Appellant.



No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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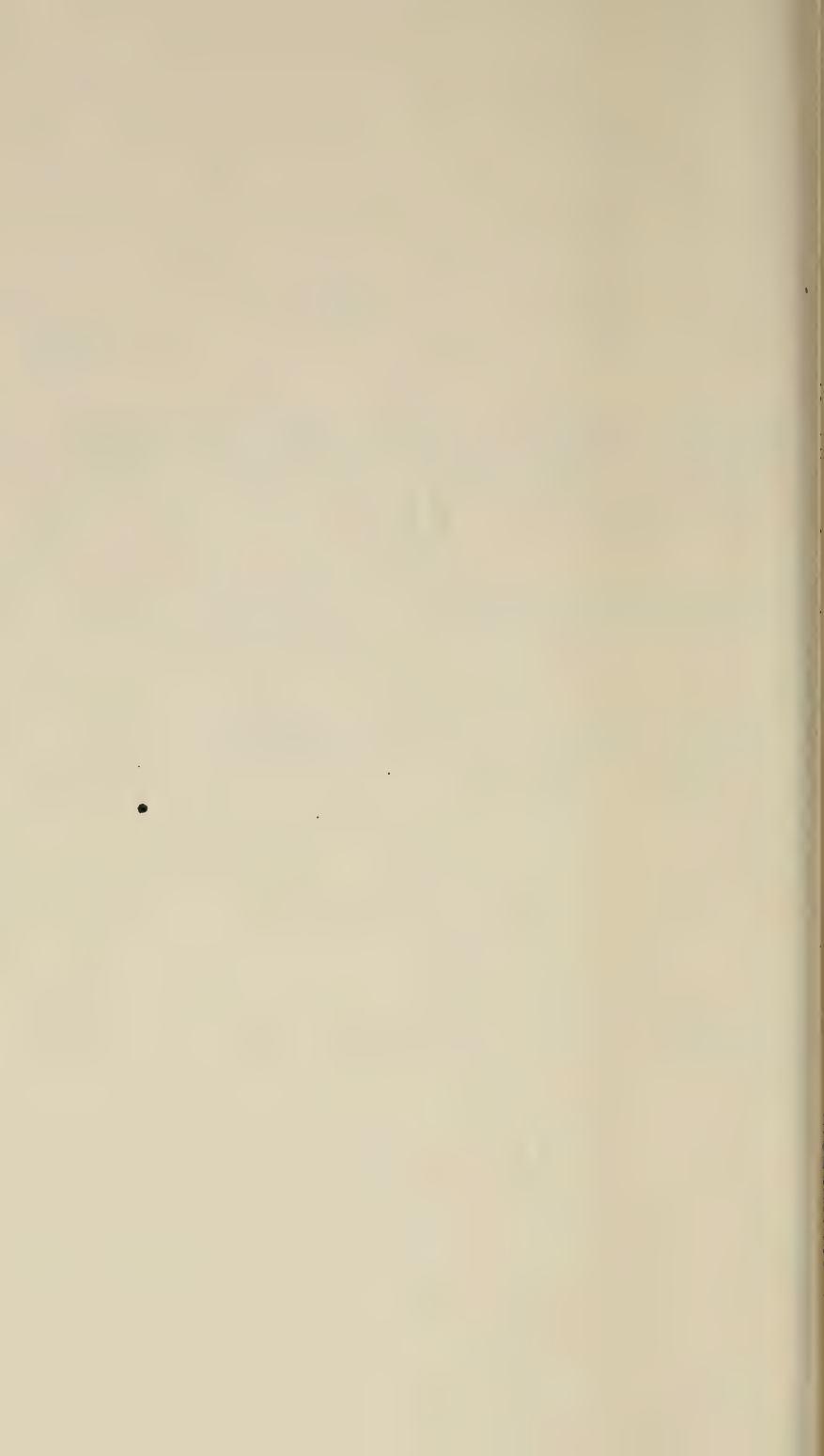
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No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Allen Smiley, appellant herein, hereby respectfully petitions this court for a rehearing in this case. Appellant submits that the court has been led into serious fundamental error in several particulars:

(1) The court has premised its decision in affirming the conviction on Count 3 contained in indictment No. 20069 upon facts not pertinent to said count.

(2) The court has announced a number of erroneous conclusions of law as the basis of its decision, and

(3) The court failed to consider or determine grounds relied upon for reversal which are in themselves determinative of the appeal.

I.

The Court Has Premised Its Decision in Affirming the Conviction on Count 3 Contained in Indictment No. 20069 Upon Facts Not Pertinent to Said Count.

In testing the affirmed Count 3, all of the evidence pertaining to the two remaining counts, which were reversed by this court, must be excluded. The count affirmed related to an arrest by the Sheriff's office of Los Angeles County. There was no evidence whatsoever of any comity arrangements between the Sheriff's office and any other police agency respecting the interchange of information or that the Sheriff's office furnished any information gathered from booking slips at the time of a person's arrest to any other police agency whatsoever, or furnished any information to any agency, police or otherwise.

The sole testimony concerning this count came from the witnesses Siu, Becker and Hopkins. [R. 80, 92, 121.]

The sole testimony of the purpose of booking and the use made of the information was as follows:

The witness Siu testified on direct as follows:

“Q. Mr. Siu, what we want here is: What is meant by ‘booking’? A. ‘Booking’ is getting the information down on paper before we take them to the County Jail.

Q. Then the prisoner is taken to the jail, is he?
A. Yes.

Q. And that information that you take down on paper, what happens to it? A. Well, that goes to the booking office, and that is copied on another piece of paper, I think it is triplicate.

Q. Do you know the *purpose* of the Sheriff's office in taking that information? A. *For a matter of record identification.*

Q. You have in your hand Exhibit 4, for identification, don't you? A. Yes." [R. 81, 82.]

This is the arrest slip [Ex. 4] made out by Siu, and contains nothing regarding citizenship.

"Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record? A. This was made out in the County Jail.

Q. Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest? A. Yes, it is." [R. 83.]

"Q. And is it a record that is required to be kept in connection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked? A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification? A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out." [R. 89.]

On cross-examination Siu testified:

"Q. Mr. Siu, directing your attention now to Exhibit 4 for identification, that is the slip that you had in your hand, was it not, and what you have been testifying from? A. Yes." [R. 85.]

“Q. Don’t you, on occasions, frequently find a recalcitrant citizen who refuses to answer questions of police officers? A. Yes.

Q. And you still have to make a booking slip for identification purposes, don’t you? A. Yes, sir.

Q. *And that is all this is, is simply to identify the individual whom you have under arrest?* A. Yes.

Q. *Now, there is no specific purpose beyond that for such booking slip?* A. *We make out a booking slip for identification and the charge that they are booked on.”* [R. 89.]

Ralph W. Becker, a Deputy Sheriff, testified that he was in charge of keeping the records “of the identification of persons booked in the Los Angeles County Jail”; that Exhibit 5 “is a booking slip of the Los Angeles County Jail”; that it was an original record and kept by him in the ordinary and regular course of business of the Los Angeles County Sheriff’s office. [R. 93.]

The witness Hopkins, a Deputy Sheriff, testified that he asked Mr. Smiley questions contained on the booking slip, Exhibit 5, at the time of his arrest, and that it contained the information received from the prisoner [R. 122]; that Exhibit 5 is a record kept by the Sheriff’s office in the regular and ordinary course of its business; “and acted upon by it in whatever business it has concerning the prisoner”; that it was required at the time that he made it out, to be preserved and kept as a record [R. 133]; that it is the customary procedure; that “the Sheriff himself supervised the formulating of that form that we used there”; that he found the form in the office, and was told to use that form in booking persons, and that is what he did. [R. 133-135.]

The foregoing is all of the evidence on the subject of use and purpose of the booking slip. In fact, the foregoing is all of the evidence on the third count unless the generalized testimony of the witness Hood would be considered pertinent.

We can see no relevancy at all to the testimony of Mr. Hood, which deals solely with the existing practice of the Federal Bureau of Investigation. Mr. Hood didn't testify that any information was received at all by his Bureau from the Los Angeles County Sheriff's office, either from finger print cards, booking slips, or from any other source. His testimony was confined solely to the practices of his Bureau and not to any practices whatsoever of the Sheriff's office. Aside from the foregoing testimony of the Deputy Sheriffs, there was no evidence whatsoever of any practice and procedure by the Sheriff's office in the use of booking slips. *There was no testimony that Exhibit 5, which contained the citizenship, was used for any purpose whatsoever.* There was only testimony of use and purpose concerning Exhibit 4 and this arrest slip did not contain the citizenship question; and as to this exhibit the testimony was that it was used by the Sheriff's office itself "for identification and the charge they are booked on." [R. 89.]

The appellant was not a known criminal, nor did he have a criminal record. There was no evidence concerning citizenship status being essential or material to the system established by the Sheriff's office. Even as to the arrest slip [Ex. 4] the evidence only disclosed that it was used to identify the individual and the charge. Of course, identity was fully established by name, address, age, height, color of hair and eyes, complexion, physical characteristics and finger prints.

II.

The Court Has Announced a Number of Erroneous Conclusions of Law as the Basis of Its Decision.

This court, on page 3, posed the basic question to be answered: "Does this answer constitute a representation *falsely* and *fraudulently* made to a person having good reason to inquire into the nationality status of appellant?" The court then said: "The allegations of the indictment and the provisions of subdivision 4, paragraph (18) of Section 746(a) require such a degree of proof to sustain the conviction." (Op. 3.) We interpret this question and statement of law as a holding that the cardinal requirements in this case were that (a) the person inquiring into the nationality status of appellant must be "a person having good reason" to so inquire; and (b) that the representation of citizenship must be both "falsely and fraudulently made."

It appears to us that this court, in reaching the conclusion that the appellant's answer to the Sheriff in connection with an arrest "on suspicion of book making" did so falsely and fraudulently to a person having good reason to inquire into appellant's nationality status departs from the holdings of all the other cases arising under this statute. The cases of this circuit, as well as of the other circuits, involve the established elements of the right legally, to inquire as to citizenship, materiality as to subject matter, deception as to material subject matter and the perpetration of fraud, *i.e.*, liquor licenses, registration to vote, supporting testimony of good character in aid of admission of an alien as an employee, radio licenses, employment, etc. In each of these cases there appeared affirmative action upon the part of the defendant to gain for himself

something which he otherwise would not have if his alienage was truthfully disclosed. In each case, the net result would, or could have been different, depending upon whether the individual was an alien or a citizen. There was direct fraud in each instance, not remote speculative possibility of future gain; also there was present in all these cases the co-existing legal right to inquire and legal obligation to answer truthfully.

In the present case, the Sheriff's system was his own; the defendant was not a party to it nor under any requirement to answer. As far as the appellant was concerned it was purely a unilateral matter. One can't defraud unless directly a party to the transaction. Mere presence alone does not suffice. The question involved here could be enlarged to any series of questions for information that might strike the Sheriff's fancy. There is no evidence of any purpose for asking the question. Nor is there any evidence of any advantage and benefit to the defendant in falsely answering the question, or evidence of the corollary that the Sheriff was put to any disadvantage or suffered the loss of any benefit. And, the trial court instructed, the party who makes a false claim of citizenship must make "it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it." [R. 273.]

Again the trial court instructed that before a false statement as to nationality status would be an offense the person inquiring must be engaged "in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration." [R. 274, 275.] What was the matter then under consideration; the arrest of appellant on suspicion of bookmaking and at most his identity. Identity of the

person accused of suspicion of bookmaking is fully established by age, address, color of hair and eyes, complexion, physical characteristics and finger prints. Identity is and can be established wholly apart from citizenship. Citizenship is truly a status as distinguished from identity. Nationality status was not relevant or material to either the arrest or identity. There isn't even a shred of evidence as to purpose or use of Exhibit 5. The sole evidence is that it was a form used by the Sheriff.

This court in its opinion, seems to resolve that the existence of fraudulent purpose is proved by concealment from the Sheriff of his true nationality status because "it is fair to assume that appellant was concerned with future consequences." This court then states that "The three arrests and a pending investigation by the Immigration Department on a deportation charge warrants this conclusion. We see no other motive for the false statement and that it was 'made with intent to deceive * * *' as to a material matter."

The record, of course, discloses that compulsion and duress is practiced to obtain answers to the questions contained on the booking forms; that if an arrestee declines to answer, he is booked as a John Doe and incarcerated in a cell until he does answer the questions. [R. 89, 109, 110.] We also know that the Naturalization and Immigration Service was, through their previous investigation and his sworn testimony before them as well as his registration as an alien at all times, fully aware of his citizenship status. We also know that there is no evidence in the record of any exchange of information between the Sheriff's office and the Naturalization and Immigration Service. We also know that the charge here was for suspicion of bookmaking and a misdemeanor. *There were no future*

consequences that he could suffer by reason of disclosing his alienage; and this even if the Sheriff had a system of advising the Naturalization and Immigration Service concerning the arrest and charge.

Good moral character was and is not involved in the charge upon which he was arrested. We can take judicial notice that under the Immigration and Naturalization laws, no consequences adverse could have resulted because of an arrest for suspicion of gambling. There was not the slightest advantage and benefit gained by appellant by not truthfully disclosing his alienage; neither was the Sheriff put to any disadvantage or lose any benefit by reason of the answer given. **The results, advantages and benefits in all aspects would have been precisely the same if he had truthfully disclosed his alienage.**

We submit the test is not the narrow one of a person having "some right" or "a good and sufficient reason." Many persons qualify to ask nationality status on a premise of a "right" or "good and sufficient" reason, who do not have a right or adequate reason pursuant to official authority and duty, be that public or private as in the case of an employer. Such "right" or "good and sufficient reason" would exist in the case of a survey agency like Gallup in gathering information for a client concerning the attitude of the voters on a specific public issue. For example, in connection with ascertaining the view of the voters in order to assure integrity and accuracy of the survey the first question asked might well be "Are you a citizen of the U. S.?" Under the holding of this Court, "we hold that where **some right** to inquire exists *or the person inquiring has a good and sufficient reason* for learning the citizenship of the person asked, it is sufficient (Op. 5)," a person in the Gallup survey example

would be guilty of an offense under this statute. This Court wholly fails to define either "some right" or "a good and sufficient reason." In the absence of a definition or the setting up of a standard establishing what is meant by these words, one can only conclude that what constitutes an offense has been broadened far beyond the decided cases.

This Court has said (Op. 4) that the courts have placed an interpretation beyond the literal sense of the language of the statute to the effect that the false statement must be made to a person who had "a good reason to inquire," and that it agrees with this interpretation. We have been unable to find any cases using the words "a good reason to inquire," or holding that the statute is violated if a false statement of nationality status is made to a person merely having "good reason to inquire." The *Achtner* case of course does use the language, "the representation * * * must still be made to a person having some right to inquire or adequate reason to ascertain * * * citizenship"; but it, also, sets up a standard that excludes as offenses mere untruths as to citizenship by tying together the "right to inquire or adequate reason" with fraud.

We cannot escape the conclusion that the false statement must be made to a person so situated, either in a public or private capacity, that the asking of it was in furtherance to his official authority and duty; and that the false statement would or could result in defrauding such person or his principals.

We submit that the opinion in the instant case is in conflict with the previous opinion of this court in the *DePratu* case, and is in conflict with the decided cases of other circuits.

III.

The Court Failed to Consider or Determine Grounds Relied Upon for Reversal Which Are in Themselves Determinative of the Appeal.

This court, at page 5 of the opinion, states: "The charging part of the indictments is in the language of the statute. This is sufficient in the instant case." In view of this Court's holding now that the answer must be *falsely* and *fraudulently* made we submit that the case of *United States v. Weber*, 71 Fed. Supp. 88, is precisely in point and that the indictment in the language of the statute is insufficient.

The indictment was challenged on the further ground that it does not appear therefrom that the person inquiring as to appellant's nationality status was: (1) a person to whom he was obligated to truthfully state the fact of citizenship, or (2) a person who had a legal right to inquire into, or an adequate legal reason for ascertaining his citizenship."

In neither the *DePratu* case nor the *Achtner* case was our second ground before the court. In fact, to our knowledge, these contentions have not been answered by this or any other court. We have set forth our views at page 33 of our opening brief and page 10 of our reply brief.

For the foregoing reasons, we earnestly urge that a rehearing in this case be granted; that further and a more extended consideration be given to the subjects hereinbefore discussed; and that the opinion of this Honorable Court upon the points hereinbefore mentioned be clarified.

Respectfully submitted,

OTTO CHRISTENSEN,

ROBERT NEEB,

Attorneys for Appellant.

Certificate of Counsel.

Otto Christensen, one of counsel for Allen Smiley, appellant in the above entitled cause, does hereby certify that the foregoing petition for rehearing is, in his opinion, well founded, and is not interposed for delay.

OTTO CHRISTENSEN,

Attorney for Appellant.

No. 12375

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

ERNEST A. TOLIN,

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FILED

MAY 1 1956

WILLIAM P. GERRIN,

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No. 12375
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes now the United States of America, Appellee in the above entitled cause, and presents this, its Petition for Rehearing, as to Count One of Indictment No. 20069 and as to the single count pleaded in Indictment No. 20604.

Preliminary.

In his Brief and oral argument, Appellant stressed contentions which have been decided adversely to him by this Court in its Order affirming the Judgment of Conviction on Count Three of Indictment No. 20069. In oral argument, counsel for Appellant conceded that if the conviction was good as to one count, it was good as to all counts. In the light of Appellant's stress upon issues which he charged to be controlling, Appellee devoted its Brief and oral argument to rebuttal of Appellant's major contentions, and here presents its argument upon points made by the Court in reversal of the first count of Indictment No. 20069 and the single count of Indictment No. 20604.

STATEMENT OF GROUNDS FOR REHEARING.

The Opinion of This Honorable Court, Insofar as It Relates to Reversal of Count One of Indictment No. 20069 and the Single Count of Indictment No. 20604, Invades the Province of the Jury Which Had the Exclusive Right and Duty of Weighing the Evidence Admitted in Proof of the Two Counts With Which This Petition Is Concerned.

In its Opinion the Court stated:

“The evidence fails to establish beyond a reasonable doubt that appellant falsely represented himself to be a citizen of the United States. A person may be born in the United States and remain therein for life and yet not be a citizen and while it may be that an officer, upon being informed by one whom he has under arrest that he, the party in custody, was born in the United States and had lived therein all his life, would conclude that the person whom he was interrogating was a citizen of the United States, it would be no more than a conclusion reached without the necessary supporting facts.”

The Court has thereby based its decision as to the two counts involved in this Petition upon the ground that although the respective police officers “would conclude that the person whom he was interrogating was a citizen of the United States,” the conclusion would be reached without the necessary supporting facts. The Court has further stated that the answer given by Appellant that he was a “citizen” does not establish that he falsely represented himself to be a “citizen of the United States.” The decision of the Court appears to be that a representation

that one is a *citizen* of “*American*” nationality *born in New York* with residence in the United States for life does not add up to a representation that such a person is a citizen of the United States. It is submitted that any person asked the question as to whether he is a citizen, in making an unqualified reply that he is, thereby makes a representation that he is a citizen of the country in which the inquiry is made. That the combination of answers given by Appellant necessarily add up to a total of “representation of citizenship” is apparent from Article XIV of “ARTICLES IN ADDITION TO, AND AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.” Said Article, insofar as pertinent here, reads as follows:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

In its comment upon the law established thereby, 14 Corpus Juris Secundum, at page 1150, states:

“a. Presumptions and Burden of Proof.

“In the absence of proof to the contrary a person is presumed to be a citizen of the country in which he resides, but, where it appears that a person was born in a certain country, there is a presumption that he is a citizen or subject of such country until there is a showing to the contrary.

“In the absence of proof to the contrary every man is considered or presumed to be a citizen of the country in which he resides. * * *.”

The leading case appears to be *United States v. Wong Kim Ark*, 169 U. S. 649. Wong Kim Ark was born in the City of San Francisco, California. His parents were Chinese and subjects of the Emperor of China. Wong Kim Ark resided in California until he was a young man when he visited China. When he sought to return, the Chinese Exclusion Act was raised as a bar to his re-entry. At page 906, it was said:

“* * * The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons of whatever race or color, domiciled within the United States. * * *.”

Also, at page 910, it was said:

“The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there

carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that *the question must be answered in the affirmative.* Order affirmed.”

The same rule is announced in *In re Gogal*, 75 Fed. Supp. 268, as follows:

“A person who is born in the United States, regardless of the citizenship of his parents, becomes an American citizen not by gift of Congress but by force of the Constitution. U. S. C. A., Constitutional Amendment 14, Section 1.”

It is a familiar rule that special exceptions within the knowledge of a defendant are defensive matters. A corollary thereto is that one undertaking to state facts which lead to a definite conclusion, *i. e.*, that he is a citizen of the United States, must be held to have intended to represent that he was such a citizen unless facts are stated bringing himself within an exception. Such a statement might be that he was born to persons in the diplomatic service of a foreign nation temporarily sojourning here on a diplomatic mission or some other one of the unusual and rare circumstances which withhold constitutional acquisition of citizenship from persons born within the United States. Appellant contented himself with a series of answers which spelled out citizenship in the United States. The jury decided that he intended the officers to believe that he was a citizen of this nation. There is un rebutted testimony that Appellant, at another time, before an officer of the Immigration Service, stated that he was born in Russia [Tr. 156] and it was stipulated that Appellant was born in some unknown town in Russia

approximately forty years ago [Tr. 208], and has been a resident alien of the United States during all the times mentioned in the Indictment [Tr. 209].

This Court has emphasized that although the evidence established that the officer who questioned Appellant accepted Appellant's statements as representations of citizenship in the United States, that the combinations of words employed lacked a certain nicety of expression which the decision holds essential to a representation on the part of Appellant. If an officer is given answers which affirmatively state a series of facts combining to represent citizenship it follows that the giving of the series of representations must be a representation of citizenship and the only real question remaining is whether Appellant was wilful in leading the officer to believe Appellant to be a citizen of the United States. Such a question, being one of fact, would be for the jury.

A parallel exists between the case before the Court and *Taylor v. United States*, 167 F. 2d 752 (C. C. A., D. C. 1948). That was a case wherein the defendant was charged under a statute applicable to the District of Columbia with falsely claiming to be a member of the Metropolitan Police. In its Opinion the Court said, at pages 754-755:

"Most serious of appellant's contentions is that the trial court erred in refusing to direct a verdict of acquittal 'because there was no proof that the defendant was not a police officer.' Appellant correctly asserts that the burden was upon the Government to prove the crime charged in the indictment beyond a reasonable doubt. The question is whether the Government sustained this burden to such an extent as to justify the trial court in permitting the case to go to the jury. Once the case was submitted to the jury

the questions of credibility of witnesses (where, as here, there was direct conflict in the evidence) and of reasonable doubt were for the jury.

“We consider the trial counsel for the Government exceedingly blameworthy in that he failed to offer the direct proof that appellant was not a police officer by the easy and conventional manner of proving such crimes, which is to say by putting on the witness stand an officer having charge of the official rolls and records of the Metropolitan Police and testifying from them whether or not appellant was at the time a member of that force. The Government failed to adduce this simple and convincing testimony.

“. . . The burden was on the Government and remained on the Government, although *it is an established principle that where defendant is charged with falsely pretending to be an officer of the United States, and he fails to produce evidence showing he was such an officer, the presumption arises that the evidence, if produced, would have been unfavorable to defendant.* *Scala v. United States*, 7 Cir., 1931, 54 F. 2d 608, certiorari denied, 1932, 285 U. S. 554, 52 S. Ct. 411, 76 L. Ed. 943.

“The case, then, boils down to these simple propositions: 1. Did the Government, blundering in its presentation and ignoring the safe and simple but somewhat more troublesome method of proving its case, nevertheless produce sufficient evidence to justify the trial court in submitting the case to the jury? 2. Did the evidence submitted to the jury by the Government justify, in the light of *all* evidence, the verdict arrived at by the jury?

“It is our opinion that the evidence was sufficient and that it justified the verdict. Without exculpation of the Government’s halting and feeble presenta-

tion of the case, we believe that it was possible for the trial judge, as the learned Justice who tried the case evidently did, to piece together enough evidence to justify him in allowing the case to go to the jury.

“There was evidence that at no time, either in assuming to order the officers to move on or upon demand of the officers at the time of his arrest, did defendant show any credentials. He attempted to escape and threatened the officer with bodily harm if the latter attempted to stop him. When searched after his arrest he was found not to have a badge.

“From the evidence it was possible to piece together a case for the jury. As was said by Judge Alschuler, speaking for the court in Scala v. United States, supra: ‘While it must in some manner appear that the accused were not federal officers, this negative proposition is fairly inferable from character of proof much less direct and formal than might be required to affirmatively establish official capacity. Any facts and circumstances which to the average mind would fairly tend to indicate that these were not federal officers will be sufficient to warrant the jury in reaching such conclusion.’ 54 F. 2d at page 609.

“We are of the view, therefore, from the evidence produced, that the trial court was justified in overruling the appellant’s motion for a directed verdict and in submitting the case to the jury. To be sure there was direct conflict in the evidence, but that has been resolved by the jury. In our opinion there was sufficient evidence to sustain the verdict.” (Emphasis added.)

See also, *Henderson v. United States*, 143 F. 2d 681 (C. C. A. 9, 1944), at page 683:

“* * * There may be lurking in the dark of silence some unusual, unthought-of set of circumstances which would show a monstrous mistake has been made. But the evidence is barren of any suggestions of those who might know with respect to circumstances along that line, and any such circumstance can only be conjured up by the imagination.”

It is a familiar principle of law that evidence of similar offenses is admissible to prove intent where intent is in issue (*Henderson v. United States, supra*). The Judgment of Conviction which has been affirmed (Count Three of Indictment No. 20064) is the earliest offense chronologically in the series with which Appellee was charged in this prosecution. This Court has held that the answer “Yes” to the question “United States citizen?” was a direct representation that Appellant was a citizen of the United States at the time he gave that answer. Under circumstances where at the first pertinent transaction Appellant represented he was a citizen of the United States, it can reasonably be taken that his intent in answering that he was a citizen of American nationality at a later time was also intended by him to be a representation that he was a citizen of the United States. The same result will follow as to the third representation in the chronological order of offenses. Failure of the police officer in making his inquiry to add the words “United States” to the inquiry “citizen,” cannot supply a lack of understanding to Appellant who had already been asked in a police station whether he was a citizen of the United States and who then fitted his answers to the accompanying questions (*i. e.*, birthplace and length of time in this nation), to the same pattern of falsehood which he employed at the time

of his earlier false representation when the ultimate question "are you a citizen" was propounded to him with legalistic fullness of phrasing.

It is apparent from the foregoing that the trial jury and the trial judge resolved the question of fact against Appellant. If argument could dissuade the trier of fact from the inevitable conclusion that Appellant represented himself to be a citizen of the United States, the District Court was the forum and the trial jury the sole judge of the convincing strength of the evidence. The evidence is certainly capable of supporting the conclusion that Appellant represented himself to be a citizen of the United States. In *Fraina v. United States*, 255 Fed. 28 (C. C. A. 2, 1918), it was said, at pages 34-35:

"Plaintiffs in error are really objecting to the weight of the evidence, and appealing to this court to override the jury's verdict, and therefore they print every word of the trial. We are not permitted to be concerned with that matter. Appellate courts, unless given power by statute, do not sit to correct the possible errors of the jury, but those of the court. *While it is the jury's duty to take the law from the court, and to apply that law to the facts as they find them* (Sparf v. United States, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343), *and it is the court's duty to see that there is some evidence tending to prove every element of the crime alleged* (Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726), *the jury's supremacy as to facts, including the inferences of fact drawn from proven phenomena, is unquestioned.* Indeed, even as to matters of law, Story, J., who is credited with establishing our present doctrine, instead of the theory that in criminal causes the jury judges both the law and the facts, admits the jury's 'physical power,' though not the 'moral

right,' to disregard the court's law. *United States v. Battiste*, Fed. Cas. No. 14,545, 2 Sumn. 240. If a verdict of acquittal in the teeth of the law be rendered, it must stand unreversed and unpunished since *Bushell's Case*, Vaughn, 135; and a verdict of conviction, though resting on inferences of fact that the judges would not draw, is assailable in an appellate court, only by demonstrating that reasonable men could not, as matter of law, be convinced beyond a reasonable doubt. The feat is always difficult, and we are far from finding it possible in this instance." (Emphasis added.)

This Court has declared the same rule in *Henderson v. United States*, 143 F. 2d 681 (C. C. A. 9, 1944), at page 682:

"It is a familiar principle, which it is our duty to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution, *United States v. Manton*, 2 Cir., 107 F. 2d 834, 839; *Shannabarger v. United States*, 8 Cir., 99 F. 2d 957, 961; *Borgia v. United States*, 9 Cir., 78 F. 2d 550, 555. * * *."

In the earlier case of *Coplin v. United States*, 88 F. 2d 652 (C. C. A. 9, 1937), this Court, at page 664, said:

"With regard to the foregoing testimony, as well as much of the other evidence discussed by the appellants, it should be borne in mind that the question of weight and credibility is for the jury and not for the court."

See also, *Roberts v. United States*, 151 F. 2d 664 (C. C. A. 5, 1945), where it is said, at page 665:

“We are not triers of fact. The law, in its wisdom, does not authorize this court to substitute the reactions as to the facts which it gains from a perusal of the cold, printed type for those of the lower court which saw and heard the witnesses, observed their demeanor on the stand, and thus was placed in far better position to know the true and false than this court; and where, as here, we cannot say that there was no substantial evidence upon which the verdict and judgment of the lower court was based, the verdict and judgment of the court below will not be disturbed.”

In 1948 this Court reiterated its adherence to said principle in *Pasadena Research Laboratories v. United States*, 169 F. 2d 375 (C. C. A. 9, 1948), at page 380:

“To clarify the matter for once and for all, we wish to restate plainly that *this court is not concerned with the weight of the testimony adduced below.* ‘Questions of credibility were for the trial court.’ * * *.” (Emphasis added.)

It is respectfully submitted that the trial jury exercised an exclusive power to determine whether Appellant’s multiple statements amounted to wilful representation of citizenship and that the uncontradicted testimony of officers who were before the jury established a combination of facts which, under the authorities above referred to, amounted to wilful false representations that Appellant was a citizen of the United States.

Wherefore appellee respectfully prays that this Honorable Court grant this Petition for Rehearing and that the Judgments of Conviction as to Count One of Indictment No. 20069 and the Indictment No. 20604 be, upon further consideration, affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

Attorney for Appellee.

Certificate of Counsel.

I, counsel for the United States of America, appellee in the above-entitled cause, do hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and is not interposed for delay.

ERNEST A. TOLIN,

United States Attorney.

